THE

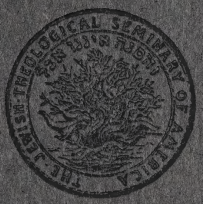
JEWISH LAW OF AGENCY

With Special Reference to the Roman and the Common Law

By

ISRAEL HERBERT LEVINTHAL, D.H.L.

A Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Hebrew Literature in the Jewish Theological Seminary of America.



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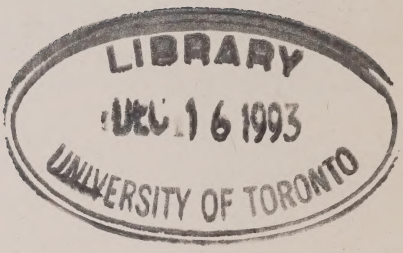

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TO MY WIFE

FAITHFUL HELPMATE IN ALL MY ENDEAVORS

IN LOVE AND GRATITUDE

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THE JEWISH LAW OF AGENCY

Introduction

Importance of Jewish Law

The Jewish people have been credited by the world with having contributed more than any other people in the domain of Religion and Religious Morality. Even the most stubborn of our opponents admit that Religion would not have been the force and the power in civilization that it is were it not for the Jew. Few, however, know how much the Jew has contributed to other fields in the realm of human progress. To Rome is given unstinted praise for her legal system and for her influence upon juristic development. No text-book on any legal topic fails to pay homage to Rome for her contribution in the field of law. That she deserves most of this praise, no one will doubt. But that the Jew is deserving of more credit than he receives for his contribution in the field of law, is realized by only a few.

When one delves in the pages of the Talmud and glimpses in the works of the later rabbis, he marvels at the fine legal insight possessed by these ancient sages; and at times he would almost be led to believe that he is studying the laws of some modern and highly developed code. Nay, more, he would begin to ask himself: Is it possible that this ancient collection of laws, that are so in consonance with the modern juristic spirit, should have had no influence upon the systems of law that rule the peoples of to-day? He would then, undoubtedly, come to the conclusion reached by President Woodrow Wilson when he said, in his treatise on the State: "It would be a mistake, however,

to ascribe to Roman legal conceptions an undivided sway over the development of law and institutions during the Middle Ages. The Teuton came under the influence, not of Rome only, but also of Christianity; and through the Church there entered into Europe a potent leaven of Judaic thought. The laws of Moses as well as the laws of Rome contributed suggestion and impulse to the men and institutions which were to prepare the modern world; and if we could but have the eyes to see the subtle elements of thought which constitute the gross substance of our present habit, both as regards the sphere of private life, and as regards the action of the state, we should easily discover how much besides religion we owe to the Jew".[1]

It is true that all ancient peoples have developed certain systems of law, and in fact many are the laws that are found to be similar among them. The eminent scholar and father of the study of Comparative Law, Josef Kohler, has even gone so far as to say: "The more we proceed in our study of humanity the clearer and the more evident it becomes to us that the whole human family, despite national peculiarities, are actuated not only by similar instincts and desires, but especially in law and in the development of public institutions, they show the influence of similar cultural forces."[2] But the more we study ancient law, the more we come to the conclusion that in no other system has law so much in commcn with the modern development, and nowhere are the true grounds and reasons of law so well declared as in the jurisprudence of the Jew.

The study of Jewish law is important not only because of its essentially modern conception of human relationship, but also because by means of this study we get the clearest insight into the unconquerable spirit of the

[1] Section 220.

[2] "Ueber die Methode der Rechtsvergleichung," in Gruenhut's *Zeitschr.*, Vol. XXVIII, p. 273.

Jewish people. He who would endeavor to comprehend and to appreciate the national life of the Jew, he who wants to understand the spirit which helped to create his divine literature, must first become acquainted with the foundation, the groundwork upon which such a life was reared. This foundation and ground-work is not, as in the case of other peoples, to be found in their land, but in the law of Israel.[3]

The Distinctiveness of Jewish Law

What impresses the student of Jewish law, even more than its similarity to the latest modern systems, is the humane spirit that permeates the entire body of the law. To do justice is the very purpose of all law, but justice itself, if carried to extremes, may sometimes result in injustice. Jewish law endeavors to be humane as well as just, and, therefore, takes cognizance of the human element in all human relationship. And it is this humane element that strikes a distinctive note and makes its strongest appeal even to the non-Jewish student.[4] Perhaps this is due to the fact that among the Jews the distinction between religious and secular law was not known.[5] The division by scholars of the Mosaic and rabbinic legislation into moral, ritual, and legal laws is wholly arbitrary.[6] In fact the religious element plays a very important rôle in all ancient nature peoples and permeates every phase of their life. "Law and religion are to them one and the same thing. Indeed law is but one of the many forms by means of which their religious ideas are put into effect."[7] In the

[3] cf. J. L. Saalschütz, *Das Mosaische Recht*, Berlin, 1853, p. 13.

[4] cf. Dr. Josef Kohler's Introduction to *Der Talmud und sein Recht*, by Dr. Mordche W. Rapaport, Berlin, 1912, p. 4: "Besonders wohltuend aber wirkt die Humanität des jüdischen Rechts."

[5] Roman law does make this distinction in Jus and Fas, cf. Leopold Wenger *Das Recht der Griechen und Römer*, p. 184; R. Sohm, *The Institutes*, 3d ed., p. 22, note 2.

[6] Cf. Nathan Isaacs, *The Law and the Law of Change*, p. 4.

[7] Cf. J. Kohler, *Die Anfänge des Rechts und das Recht der Primitiven Völker*, in *Allgemeine Rechtsgeschichte*, p. 3.

case of the Jew, however, his religion not only influenced his law, but permeated its very structure. His law was to him part and parcel of his religion, and Kohler grasped the force of this truth when, eulogizing Jewish law, he exclaims: "Das Recht des alten Israel....es war ein Sakralrecht im höchsten Sinne".[8]

The Basis and Development of Jewish Law

At the outset, we must endeavor to understand the basis and the development of all Jewish law. Each and every law must be based upon, and find its source in, Holy Writ or at least in an oral tradition bearing upon an interpretation of the biblical word or phrase. In the discussion of every law, you will always find the expression: "Upon what Scriptural verse is it based?". The Talmud is not a code formulated by a legislative body, nor does it, of its own volition, decree the law. It derives its authority solely from the Scriptures, and the interpretation of the biblical words is its principal function.[9]

That does not mean that all Jewish laws are to be found in the Bible. Post-biblical Jewish law most certainly went beyond Scripture. New provisions had to be created to meet new conditions which could not have been foreseen. The scribes, and later, the rabbis, for political, national, and natural reasons, endeavored to create, by legal fictions, by equity and by legislation,"a hedge around the Torah", a "chain of tradition". Though in theory the legal canon was closed forever, it did not in fact prevent the Jews from interpreting and developing their laws and precepts with life-giving freedom. But this interpretation and development was always centered about the Bible.[10]

[8] J. Kohler, *ibid.* ch. on "Israelitisches Recht," p. 71.

[9] Cf. *Der Talmud und sein Recht*, by Dr. M. W. Rapaport, p. 4.

[10] N. Isaacs, *ibid*, p. 4; cf. Sir Henry Maine, *Ancient Law*, ch. 2, for a discussion of the agencies by which law in general is brought into harmony with the progress of society. The same instrumentalities operated in the development of Jewish law.

Especially is this true in the case of the Civil Law. The development here presents a remarkable contrast to that of the Criminal Law. While the latter retained all through the course of existence its Mosaic character, the former was practically a talmudic edifice reared on Mosaic principles. But this contrast is explained easily enough. Criminal and capital laws are closely connected with the existence of an independent state; civil laws enjoy a certain independence of political conditions; autonomy itself offers an ample field for the growth of the latter. And as the Jews continued to enjoy their autonomy for a long time in Palestine, and especially in Babylon, after their right to practise their criminal law was taken from them, their civil system continued to develop after the destruction of the state, with ever increasing vigor. In fact it reached its culmination in Babylon.[11]

The Bible itself contains comparatively very few civil laws, and even those mentioned are not stated explicitly but casually. Contracts and obligations are hardly touched upon. The only laws sufficiently expounded are those of damages, guardians, and inheritance. It is evident that the civil laws mentioned in the Pentateuch were adjusted to an agricultural community, living in the small circle of its family possessions, without practising much commerce or industry. As soon as the family circles were broken and intercourse and commerce spread, the few prescribed laws proved insufficient and a system of civil laws had to be constructed. It is possible that under these conditions, Jewish civil law was somewhat influenced by the system of more commercial nations, such as the Baby-

[11] It is for the same reason that one may note that Philo in his discussion of Jewish law is more in conformity with the rabbis in civil law than in criminal law. The latter was not permitted to be practised by the Jews in his day, and so he was dealing with theory alone, and there he was often the preacher or philosopher instead of the legalist. In his discussion of the civil law, he was in agreement with the rabbis, because that was actually practised, and he could not therefore interpret it differently.

lonians, with whom they came in contact. During the second Temple the civil law kept on developing according to the life, conditions, usages, and rules of conduct of the age, adapting and modifying usages of other legal systems, most likely the Roman.[12] As already stated, the Jews practised their own civil law even after the loss of their sovereignty, and it continued its development, reaching the height of its glory in the Babylonian period.

In later years attempts were made to collect in systematic fashion the manifold legal decisions scattered throughout the pages of the Talmud. One of the first and foremost of these codes or digests of the law was the Mishneh Torah, or the Yad ha-Ḥazaḳah, of Maimonides,[13] in which the author strives to state the law as the Talmud has it and in which he also mentions certain cases which show the later development of the law. The next great work of systematizing talmudic law is the Ṭur, a code of law, written about 1340 by Jacob ben Asher.[14] Finally must be mentioned the Shulḥan Aruk of Joseph Caro,[15] which again endeavors to give a clear and concise statement of Jewish law. The law in these codes, however, must be studied carefully in order to know which may be traced to talmudic sources, as in the interim between the Talmud and the Shulḥan Aruk, Jewish law continued to grow and to develop.

Difficulty in Studying Talmudic Law

When we compare the Jewish law of the Talmud with the Roman law, one thing must be said to the advantage of the latter. Roman law is a model of system and arrange-

[12] Cf. M. Waxman, "Civil and Criminal Procedure of Jewish Courts," *Seminary Annual*, 1914, p. 263. For arguments endeavoring to prove that the rabbis did not consult, and were not influenced by, the Roman law, see Hirsch B. Fassel, *Das Mosaisch Rabbinische Civilrecht, Vol. I*, p. 6 f.

[13] Rabbi Moses ben Maimon, Arabic name Abu Imran Musa ben Maimun ibn Abd Allah, b. 1135 in Cordova, d. 1204 in Cairo; cf. *J. Encycl.* IX, p. 73.

[14] 1280-1340; cf. *J. Encycl.*, VII, 27.

[15] 1488-1575; cf. *J. Encycl.*, III, 585.

ment. It was a guide for the actual life of its citizens. General principles of law, only, are given, and it was the function of the judge to decide the detailed case before him upon these stated principles. In the Talmud, however, the reverse is the truth. System and arrangement are lacking. The Talmud is not a code of general legal principles, but rather a compilation of discussions of detailed and specific cases of law. Furthermore it must be remembered that the Talmud is not a legal work alone, but comprises many other subjects. The legal subjects treated therein are, therefore, not systematized and arranged in certain parts, but scattered throughout the many volumes and their pages. The same subject may often be discussed in various sections and under different headings.[16] It is because of this difficulty that so few attempts have been made to treat the legal topics of the Talmud, and that many of those which have been made contain conclusions and deductions that are erroneous and fallacious. It must, furthermore, be remembered that most of those who hitherto wrote on the law of the Talmud were theologians rather than jurists, and theologians not altogether free from prejudice and bias.[17] The day has come when this interesting branch of study should engross the attention not only of theologians but of lawyers and jurists as well, especially those students who realize the importance of the study of Comparative Jurisprudence. They will then find that what was said by Hale, the distinguished English jurist, with reference to Roman law might equally well be said of Jewish law: "He set himself much", says Bishop Burnet, his biographer, "to the study of the Roman law, and though he liked the

[16] For a study of the contents and system of the Talmud, cf. H. Strack *Einleitung in den Talmud;* M. Mielziner, *Introduction to the Talmud.*

[17] For an exhaustive analysis of works by Christian authors treating erroneously Jewish law, see *Die Rechte der Israeliten, Athener und Römer*, by Dr. Samuel Mayer (Leipzig, 1862), p. 3 ff.

way of judicature in England.... yet he often said that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there, and lamented much that it was so little studied in England".[18]

THE LAW OF AGENCY

Meaning and Scope of Subject

Agency in its broader sense includes every relation in which one person acts for or represents another by his authority. This is not the sense in which it is endeavored in this paper to study the Jewish law of Agency. Such an inquiry would be too broad in its scope and would include studies in guardianship, bailments, letting and hiring, trust and partnership, wherever one may act in the interest of another without being technically his agent.[19] Here we shall limit ourselves to the more restricted sense in which the term is used in the Anglo-American law, and shall deal with the relations established when a person known as the agent is authorized to represent and act for another, known as the principal, and does so represent and act for him, thereby legally binding the principal in his connection with a third person; and also with the relations established when a representative is vested with authority to perform operative or mechanical duties for his principal, not intending to create any new legal relations between him and third persons, but simply acting for his benefit or interests alone.[20] In other words, we shall deal with the subject as understood in the modern law under the headings of principal and agent and master and servant.

[18] Quoted by James Bryce in *The Academical Study of the Civil Law*, Macmillan, 1871, p. 61.

[19] Though the Ṭur and Shulḥan 'Aruk (Ḥoshen Mishpaṭ, 186, 1.2) include conditional sales in their chapters on Agency.

[20] Mechem's *Agency*, p. 5, 6.

The person who serves a principal in this relation is his agent, known in Jewish law as שָׁלוּחַ *Shaluaḥ* or שָׁלִיחַ *Shaliaḥ* "one who is sent";[21] the person who sends or who authorizes the *Shaliaḥ* to represent him is usually termed מְשַׁלֵּחַ the *Meshalleaḥ* or שׁוֹלֵחַ *Sholeaḥ* "one who causes to be sent or one who sends"; the relation created between the two is known as שְׁלִיחוּת *Sheliḥut* or "agency".

Distinction between Agency and Other Legal Relations.

It is sometimes quite difficult to determine whether a certain contract creates the ordinary relation of principal and agent or a special relation covered by some of the other branches of the law, as, for instance, the relation of partnership. A partner is also an agent, but his agency is of a special and peculiar character. Maimonides, for instance, felt the closeness of the legal relationship to such an extent that he joins the laws of both of these subjects under one heading—Hilkot Sheluḥin we-shutafin.[22] As in the English law,[23] so also in the Jewish, it is safe to say that it becomes a question of construction upon the whole agreement, and the intention of the parties will be the controlling consi-

[21] I am indebted to Prof. Louis Ginzberg for the suggestion that these two terms are not altogether synonymous, but that originally there was a distinction between them. The term שלוח (*shaluaḥ*) is the participle of שלח and denotes "one who is sent," and would refer to anyone sent or appointed to do a certain act. The term שליח (*shaliaḥ*), on the other hand, would be the technical designation of Agent, of one who was recognized to hold that position regularly for a principal; cf. Baba Ḳamma IX. 5 for an excellent example, where the Mishnah is careful in noting this distinction לא יתן לא לבנו ולא לשלוחו אבל נותן לשליח בית דין . The Mishnah here uses שלוח when it refers to the man's representative, appointed by him simply to receive for him the stolen property; it uses שליח when it refers to the Court's representative, to the one holding the office of agent for the Bet Din. So, too, it is worth noting that the expression שלוח בית דין, referring to the technical Court agent, never occurs. Cf. also Yoma I.4 for another example showing this distinction.

[22] Cf. Ḳiddushin 41a, where the Talmud already noticed the nearness of the relationship between partnership and agency, and where it, in fact, hints that partnership as a special form of agency.

[23] Burdick on Partnership, p. 59, 195; E. W. Huffcutt, *The Law of Agency*, 2d ed. p. 7. Crinton v. Strong 148 Ill. 587; Wright v. Davidson 13 Minn. 449.

deration, as to whether an agency or some other special relation is created.

Agency Belongs to Commercial Age.

Accepting our definition of agency, it will at once be seen that it belongs to a condition of society in which commercial transactions are highly developed. A non-commercial society, while it might have much use for servants, would have little need of agents, empowered to represent the principal in business dealings with third persons. It is for that reason that in the English Common Law, Agency, as a separate subject, is a matter of late development.[24] In fact the very title "Agency" is of modern origin. Blackstone scarcely refers to it. "The Law of principal and agent", says one of Blackstone's most learned editors, Prof. Hammond, "is derived from the canon law, and has only been introduced in the common law in recent times. Principal and Agent does not occur in Viner's Abridgement or those preceding it, and it is only at the end of the 18th century that we find it beginning to appear as a separate title as yet of very limited applications".[25] The index of Reeve's History of English Law contains no reference either to Agency or to Principal and Agent. So, too, Sir Henry Maine has no reference to this subject in his "Ancient Law". That the early Roman Law was destitute of the modern notion of Agency, is admitted by Mr. Hunter, who attempts to explain it with the statement: "It must be remembered that the absence of Agency characterizes every department of the ancient law."[26]

[24] Mechem, § 10.

[25] Hammond's Blackstone, Bk. I, p. 719. Cf. I Blackstone Comm. 427; O. W. Holmes, "History of Agency," in *Select Essays, Anglo-Amer. Legal Hist.*, Vol. III, p. 398.

[26] Hunter's *Roman Law*, 4th ed., p. 609. "Roman law was very slow to recognize the idea of representation, and the sphere within which it was applied remained throughout a restrictive one." Cf. *The Institutes*, by Rudolph Sohm, 1907, p. 220; also Mitteis. *Die Lehre von der Stellvertretung nach römischen Recht*, 1885, p. 9 ff.

But Mr. Hunter, in this sweeping assertion, fails to note the one important exception, the Jewish Law. Not only does Maimonides know and deal with the specific term of "Sheliḥut", Agency, but even the rabbis of the Talmud frequently speak of the "Shaliaḥ", the agent, and the *Meshalleaḥ* or *Sholeaḥ*, the principal, and show their complete understanding of the importance of this legal relationship.

Classification of Agents

Some modern jurists make a distinction between the relation of principal and agent and that of master and servant.[27] It is often said that the distinction lies in the fact that an agent is vested with discretion, while a servant is not.[28] According to Huffcutt,[29] the difference between the agent and the servant is not that one has discretion and the other has not, but depends upon whether his authority is to do an act which results in a contractual obligation with a third party or not. In the first instance he is an agent; in the second he is the servant.[30]

If we would apply Huffcutt's theory to Jewish law, a man sent by the principal to deliver to his wife a "geṭ" (a bill of divorce), would be an agent; if, however, the man was vested with authority to drive a horse to a designated place, he would be a servant. But it must be noted that Jewish law makes no such distinction. In both of the above instances, Jewish law would designate the party

[27] So the Roman law speaks of procurator, representative, and nuntius, messenger.

[28] XXVIII Am. Law Rev. 9, 22. Sohm, in his *Institutes*, puts the distinction thus: "A messenger is merely a conduit pipe for conveying my will, a representative is a person who wills instead of me."

[29] *Agency*, p. 18.

[30] He gives the following illustration as proof of his theory: A railroad conductor is not an agent merely because he is vested with a wide discretion as to the management of his train. He is a servant as long as his authority is to do an act not resulting in contractual obligation; if vested with authority to engage employees, then he is an agent. So a representative authorized to sell a horse at a specified price to a specified person for cash is not a servant merely because he has no discretion as to the terms of the sale; his act results in a contractual obligation, and he is therefore an agent.

vested with authority as the *Shaliaḥ*, agent.[31] And it is interesting to note that while modern text-books do speak of agent and servant, legal writers of renown minimize the distinction, and evidently agree with the Jewish law that in legal essence there is no difference between the relation of master and servant and that of principal and agent. The terms, they say, are fundamentally interchangeable and the distinction between them evidential only.[32]

Modern writers, in treating the theme of Agency, also make a distinction between general agents and special agents, the first applying when the agent has authority to act for his principal in all matters, the second applying when the agent is authorized to act for his principal only in a single, specific transaction. Jewish law makes no such distinction, and again it is worth noting that the more advanced authorities are in agreement with the Jewish view.[33]

Jewish law makes only the following distinctions, or rather classifications, in the field of agency. It speaks of the סַרְסוֹר *Sarsor*, literally, a broker or middle-man, but which is defined by Maimonides and the later codes as a *Shaliaḥ* or agent, who receives pay for his labors in the principal's behalf.[34] The Baḥ[35] makes a very striking distinction between the word *Sarsor* as used by Maimonides in connection with agency and the word סַרְסַר *Sarser*, also

[31] Many cases discussed in the modern text-books under the heading of Master and Servant would, in Jewish law, find their place under the specified subject of "Laws of Hiring," שכירות.

[32] XXVIII Am. Law Rev. 9; IV *Harvard Law Review*, 345, and V *Harv. Law Rev.* 1, articles by Holmes. Historically, of course, the law of principal and agent is an outgrowth and expansion of the law of master and servant. Cf. Kingan v. Silvers 13 Ind. App. 80; Mechem, § 8.

[33] "The distinction given by writers (referring to terms general and special in agency) is a vague one, and often leads to more confusion than it cures. Writers do not agree as to the distinction itself, much less as to its legal effects." Huffcut, *ibid*, p. 19.

[34] Maimonides, Sheluḥim II.6; Ṭur and Shulḥan 'Aruk, Ḥoshen Mishpaṭ, 185, 1.

[35] "Bayit Ḥadash," commentary on the Ṭur by R. Joel Sirkes (b. at Lublin, 1561; d. Cracow, 1640; cf. *J. Enc.*, XI, 397), to Ṭur 181, 1.

used by him in his discussion of Sales.[36] The former, he suggests, means agent; the latter means a broker, a middleman or commissioner,[37] called in the Talmud סַפְסִירָא *Safsira*, broker.[38] The *Sarser* is subject to the same laws as an ordinary purchaser, and not as the *Sarsor*, or agent. Hence, if a principal said to his *Sarsor* or agent: "Sell for me my pin for $100", and he sold it for $200, the extra money received would belong to the principal;[39] but if a *Sarser* were told to sell for $100, and the article brought more, the surplus would belong to the broker.[40]

From the definition of *Sarsor*, as given by Maimonides, that he is the paid agent, we would infer that the general term *Shaliaḥ* agent, as used in the Jewish law, refers to a gratuitous agent alone.[41] While there is this distinction between the *Sarsor* and the *Shaliaḥ*, viz. that the former is a paid agent and the latter is a gratuitous agent, the legal consequence of their relation to the principal and to the third party is the same, with the one exception, the question of the agent's liability to the principal for loss or damages suffered by him.[42] I believe that it would be more correct to say that the term *Shaliaḥ* is the general or inclusive term of agency, and is used when we speak of rules applying both to the paid and to the gratuitous ones, while the term *Sarsor* is used when we speak of the rules applying to the

[36] Maim. Hilkot Mekirah, ch. 7.

[37] Jastrow's Talmudic Dictionary translates סרסור broker, middleman, agent—thus making no distinction between them; סרסר he translates agent—the reverse of the Baḥ's suggestion. While the Baḥ's suggestion has force in connection with Maimonides' use of the terms and also in connection with the use by later rabbis, Jastrow seems to be correct in his interpretation as used in the Talmud. Cf. Jerusalem Talmud 'Aboda Zarah 1, 39c; לסרסור קנס .... דמסרסר לארמאי "he fined the broker.... and they called him a man that serves as a Roman agent."

[38] Cf. B. Mesi'a 42b.

[39] See below, p. 27.

[40] Cf. Baḥ, Ṭur, 181, 1.

[41] According to Roman law, agency must be gratuitous, otherwise it would be Locatio et Conductio (letting to hire), Digest XVII, 1, 6; cf. S. F. Harris, *Elements of Roman Law*, 1875, P. 145.

[42] See below, p. 68.

paid agent alone. In their legal effect, there is absolutely no difference, with the exception just noted.[43]

There is a third type of agency spoken of in Jewish law: הרשאה *harsha'ah*,[44] literally, an authorization, authority or power of attorney, and refers mostly to cases where the agent has a written power of attorney שטר הרשאה to represent his principal in court, bringing an action in his behalf to recover money, land or goods that belong to him.[45] While *harsha'ah* is used mostly in connection with court action, it does not limit itself to that, and may be used as written authority in ordinary agency to collect from the third party an article belonging to, or a debt due to the principal.[46] The main difference between *harsha'ah* and *sheliḥut*, then, is this, that the latter would refer to all contracts of agency, while the former would be used only to collect a debt or in an action to secure a certain article from a bailee or trustee, belonging to the principal. There is also a practical difference between ordinary *sheliḥut* and *harsha'ah*. It will be shown later that the death of the principal revokes at once all agency.[47] Now suppose Reuben sends Simeon to collect from Levi a debt due him or

[43] Rabbenu Jeroḥam distinctly said that the laws of Sarsor and Shaliaḥ in business transactions are exactly the same. Quoted by Bet Yosef (commentary by Joseph Caro) to Ṭur, 185, 1.

[44] Ketub. 95a; Shebu. 31a.

[45] The term *harsha'ah* is derived from the Hiphil form of the verb רשה "to have power," which originally was used in connection with the power to claim a debt (cf. Targum Onkelos to Deut. 24, 10, where the words כי תשה ברעך are translated ארי תירשי בחברך. So also in Assyrian, "Eresu" means a claim). *Harsha'ah*, then, would mean the giving of authority or power to claim a debt. It refers, however, to written authority alone, though the word שטר "written document" is ofttimes to be understood (cf Shebu. 31a). The principal, or the one who gives the *Harsha'ah* is termed the כַּרְשָׁה *Marsheh;* the agent, to whom it is given, is known as the מוּרְשָׁה *Mursheh*, sometimes also as the בא בהרשאה "he who comes with a *harsha'ah.*"

[46] Cf. Sh. Ar. Ḥosh. Mish., 122, 1.3. According to the Roman civil law, the creditor in an obligation cannot transfer or assign his rights to another. But he may by a "Mandatum Actionis" constitute the other his procurator, or "processual agent," for purposes of the action, i. e., he may commission the other to sue as his agent for the amount due under the obligation, and may further agree by what is called a "Mandatum In Rem Suam" to let the agent retain the sum recovered in the action. Cf. R. Sohm, *l. c.*, p. 221. The "Mandatum Actionis" would be similar to the *harsha'ah*.

[47] See below, p. 62.

to take from him an article of his held by Levi; suppose, further, that before Simeon performs his mission, Reuben dies. Levi, not knowing of Reuben's death, pays the money to Simeon. If Simeon would then lose the money, Levi would be responsible to Reuben's heirs for the amount. If, however, Reuben, in the same case, gives Simeon a *harsha'ah*, Levi could pay him the money, even after Reuben's death, and Simeon would assume all responsibility. The *harsha'ah*, in legal effect, transfers or assigns the claim itself to the agent, and hence the death of the principal has no effect.[48] Hence, the third party, if he so desired, has a right to refuse to acknowledge an ordinary agent, sent to collect from him a debt, while he must recognize the *Mursheh*.[49]

It is interesting to review, briefly, the historical development of *harsha'ah*.[50] From the Talmud and Maimonides it can be seen that its use was greatly restricted. Originally it was not to be used in the case of a debt or in the case where an article was sought from a bailee, the possession or title of which was denied by him.[51] It was not given in the case of a debt, even where there was documentary evidence of the loan, on the principle that the identical money loaned could not be traced, and אין אדם מקנה דבר שלא בא לעולם, "a man cannot give possession (transfer) to his neighbor of that which does not exist".[52]

[48] Sh. Ar. Ḥosh. Mish., 122, 1, cf. below, p. 63.

[49] *Ibid.*

[50] For an ingenious explanation of the origin of the institution of *harsha'ah* see *Das Jüdische Obligationes-Recht*, by Dr. Leopold Auerbach, Berlin, 1871, p. 567f.

[51] Baba Ḳamma 70a; Maim. Sheluḥin, III, 6. It must be noted that the Talmud, *ibid.*, discusses only the question of *harsha'ah* in relation to Personal Property, as in the case of Real Property there is no doubt that *harsha'ah* could be given. In the case of Real Property ownership was the all-important matter and implied the notion of possession, even though possession was temporarily denied him.

[52] Maim. III, 7, cf. Baba Batra 157a. The distinction must be noted between the documentary evidence of an oral debt, which was simply an I. O. U. paper, not sealed nor attested by witnesses, and a שטר חוב "writing of debt," a sealed bond, i. e., an acknowledgement of debt attested by two or more witnesses. The latter operates in Jewish

The Geonim, however, saw the hardships caused by this rule in that it discouraged loans, and ruled that in the case of loans, where there was written evidence of the debt, *harsha'ah* could be given, even where the debt was denied;[53] but it was still not allowed in the case of debts arising by parol. It was only later, with the development of trade and business that the rabbis allowed *harsha'ah* to be used in all cases, in debts arising from verbal as well as written contractes and in disputed cases of bailment as well as where possession was admitted.[54]

It is interesting to note that the rabbis limit the *Mursheh* to represent the plaintiff only.[55] The principal reason for compelling the defendant to appear in person seems to have been the feeling that if he were obliged to face the plaintiff in open court, there would be slighter probability of false plea or concealment of the truth on his part.[56] Besides, the plaintiff is supposed to have positive right to tangible things, whether property or money, and such rights can be transferred to an agent by the normal act of *ḳinyan*, while the defendant has only verbal answers, which cannot be transferred, so that his representative is only a lawyer, and such an office did not find favor in

legal understanding as a mortgage, from the time of its delivery, of all the debtor's land wherever situated. In the case of a שטר חוב, sealed bond *harsha'ah* could always be given, as may be seen already from a Tannaitic source (Ḳidd. 47b), for the reason that the bond itself is something tangible and concrete, and also because it carries with it "subjected property," מפני שהוא מקנה השיעבוד שבו i. e., a judgment on this bond may be levied on all real property of the debtor sold or pledged to others after the delivery of said bond. Cf. B. B. 75b, 77a, 77b; Maim. III, 7. *Harsha'ah* could not be given for the purpose of securing an oath from a third party, because it was limited to cases dealing with claims of tangible things, not where the claim was for mere words. Cf. Maim. III, 7.

[53] Tosafot, Bab. Ḳam. 70a, quoting R. Hananel and R. Tam; cf. also Maim. *ibid;* Kesef Mishneh (commentary to Maim. by Joseph Caro), *ibid.*

[54] Ḥosh. Mish. 123, 1. The earlier authorities did not favor the institution of *harsha'ah*, as may be seen from the statement of the Talmud: וכל הבא בהרשאה הרי הוא בכלל הנאמר בהן ואשר לא טוב עשה בתוך עמיו "He who comes with a *harsha'ah* may be classed among those of whom Scripture says, 'he did that which is not good among his people.'" Ezek. 18, 18; cf. Shebu. 31a; Maim. III, 5.

[55] Ḥosh. Mish., 124, 1.

[56] Be'er ha-Golah (commentarial glosses to Shulḥan 'Aruk by R. Moses Ribkes, d. Vilna, 1671) to Ḥosh. Mish., *ibid.*

Jewish law.[57] The only case, it appears, known to the Talmudists in which it was assumed that an attorney might be permitted to appear for the defendant, was one in which the high priest was sued. There, however, he was not called the *Mursheh*, but אנטלר Entlar[58] (ἠντολάριος).

Principle upon Which Agency is Founded

The theory of Agency is founded upon the oft-declared principle שלוחו של אדם כמותו[59], a man's agent is like himself, which means that one who acts through an agent is in law regarded as if he does the act himself, and also that what a man may do in person he may also, in most instances do through a representative.

Jewish law carries this principle to its logical conclusion, and shows how far more advanced and more modern it is than the law of Rome. While the latter declares that no acquisition of property could be made by a free person for the benefit of another,[60] the following passages cited from

[57] The Rosh (R. Asher ben Jehiel, b. Germany, 1250; d. Toledo, 1328, wrote an abstract of all Talmudic laws; cf. *J. Enc.*, II, p. 183), Sheb'uot 4a.

[58] T. J. Sanh. II beginning 19d; cf. Be'er ha-Golah, Hosh. Mish., *ibid*, quoting Al-Fasi and R. Sa'adya.

The reference here quoted in T. J. Sanh. ch. II, offers some difficulty. From the wording there it would seem that the reverse was the truth, and that the statement, "Let the priest be represented by an entlar," was merely an hypothetical suggestion offered, which was quickly answered by the remark that he cannot because an oath may have to be administered. On the other hand, the Rashba, quoted in the מראה הפנים *ibid.*, interprets the passage to the effect that while no express תקנה rule can be stated that the priest must be represented by an Entlar, yet if he desires to be so represented in a matter where no oath will be administered, he may do so. The Be'er ha-Golah seems to be of the like opinion. In either case, it must be noted that the institution of entlar is of a later development, as its Greek origin signifies (cf. *Aruch Completum*). It was probably borrowed from Greek or Roman law, and never received any wide-spread sanction in Babylonia, since we have no mention of it in the Babylonian Talmud nor an equivalent Hebrew or Aramaic name. The Rosh, in Shebu. ch 4, mentions the fact that it was a disputed point among the earlier authorities whether the Entlar came under the rules of agency or under special laws applying to him alone.

[59] Ḳiddushin 41b, Nazir 12b, Nedarim 72b. That this is a very old established legal maxim can be seen from the fact that it is already used as a legal term in the Mishnah. Cf. Berakot 34b, though there used in connection with a discussion of a question of ritual. The Common Law also rests upon the like principle—Qui facit per alium facit per se (Coke Littleton, 1258a).

[60] Sheldon Amos, *The History and Principles of the Civil Law of Rome*, 1883, p. 137. To the early Roman law (as to the early German law) it seemed inconceivable that a

the Ṭur will show to what length the principle was followed by the former: If Reuben says to Simeon: זבין לי מידי "Buy something for me", and Simeon buys מסחמא, without stating whether he purchases it for himself or for someone else, then, in that case, Reuben acquires possession קנייה ראובן from the very moment of delivery.[61] And even if Simeon purchases the article with his own money, he cannot, once the article has been delivered to him, claim that he meant to purchase it for himself. It is Reuben who acquires possession and the article belongs to him; it is he who can sue and be sued on the transaction and not the agent.[62]

person should acquire rights or liabilities by means of a form to which he had not been a party. As regards slaves and filii familias, it is true that whatever they acquired they acquired by the necessary operation of law, by virtue of the potestas, for their superior. But the civil law steadily refused to admit that rights could be acquired through a free representative. "Per liberam personam nobis adquiri nihil potest." Later, during the Empire, acquisition by a procurator, i. e., a freely chosen representative, in the name of the principal, was allowed. As regards contracts, however, the rule remained unaltered; that is to say, it continued to be held that contractual rights and liabilities could only accrue to the contracting party himself, and that contracts could not be validly concluded in the name of the third party. Cf. R. Sohm, *l. c.*, p. 220f.

[61] From Bab. Ḳam. 102b bot. וכי מי הודיעו לבעל חטין שיקנה חטין לבעל הבית we would infer that the בני מערבא Palestinian view was that the third party must know that the agent acts in behalf of a principal, thus agreeing with the Roman view; while the Babylonian opinion holds that the agent may also act in behalf of an undisclosed principal. Upon closer examination, however, it appears that the Palestinian view also permits acts in behalf of an undisclosed principal; the only case in which their claim is that the principal must be known is where there is a שינוי change in the performance, where the agency is broken off by a non-compliance of principal's request. For instance, where principal asks agent to purchase wheat and instead he purchases barley, there the Palestinian view is that the principal must be disclosed to allow the latter to take advantage of the bargain. Cf. Rosh, *ibid.*

[62] Ḥosh. Mish., 183, 4. Moyle (*Institutes of Justinian*) gives this as the test of true agency: To what extent is it possible for B to make a contract with C for A, so that assuming, of course, that B discloses the fact of his agency, and his principal's name and does not exceed his instruction, A alone acquires rights against and can sue C; C acquires rights against and can sue A, and B neither acquires rights nor incurs liabilities under the contract. The above case is in conformity with this test. The Roman method of procedure in such a case is very clumsy. Moyle puts the matter thus: If A being at Rome wishes to buy a house belonging to C at Naples, he would give B at Naples a mandate to buy it for him. B does so, and then assigns his rights against C to A. C's rights against B, e. g., his claim for the purchase money, can be made available against A only by a novation (that is to say, a distinct stipulation from A that he will pay C for B); if this is not done, C, if necessary, must recover from B by actio venditi, and B from A by actio mandati contraria, an action to recover the money which B has laid out for him. Here, then, none of the conditions above specified are realized, and it should be noted that B is in fact the principal and the true vendor throughout, and the only person who is entitled and bound in that capacity. According to later Roman law it was different when res corporeales were actually

Another, and a still more striking case will prove how logically they clung to the legal fiction that a person's agent is, in legal effect, the person himself. If Reuben says to Simeon: Sell for me this article for $4.00; Simeon succeeds in getting $6.00 for the article; to whom does this extra profit belong? Unhesitatingly the rabbis decide that it belongs to Reuben, because as soon as Simeon received the money in payment it were as if Reuben himself had received it with his own hand, for במקום בעלים הוא עומד "the agent stands but in the place of the principal".[63]

Whence the Doctrine is Derived

As was said above,[64] rabbinic law was based upon the Scriptures. Talmudical law hardly knew the meaning of direct legislation, but concerned itself with the development of the law of the Torah. Agency had become a necessity in the developed life of the community. It was important therefore to find the doctrine of agency in the Pentateuch. And so the rabbis seriously discussed the question: שליחות מנלן, whence is the doctrine of agency derived?[65] upon what Scriptural word or phrase is it based? And it is worth while to record here, in brief, their ingenious, but always logical, interpretation. We must derive it, says the Talmud, from the word וְשִׁלְּחָהּ, "and he sendeth her out",[66] used in connection with the husband's giving his wife a bill of divorce. Scripture might have said וגרשה "and he giveth her a divorce", but expressly used the word ושלחה (the same root as in the term שליח), to teach us that the husband can appoint an agent to deliver the bill

delivered. Then the agent could take possession for his principal. But according to the older Roman law even this was not possible, for the maxim held good "per extraneam personam acquiri non potest."

[63] Tur, *ibid*, 185, 1-3. This refers to the case where the article has no fixed market value. For further discussion of this case, see below, p. 73.

[64] Above, p. 12.

[65] Kidd. 41a and b.

[66] Deut. 24.1.

of divorce unto his wife, and hence, that a man may appoint an agent to act in his behalf. The rabbis then ask: Scripture could have said ושלח, why does it say ושלחה?—to teach us that the wife, though she is only a passive character in the matter—the husband alone being the active party in divorce proceedings—can likewise appoint an agent to receive her bill of divorce. From the fact that the Bible in the same context[67] repeates the word ושלחה we may deduce the rule that an agent may appoint a sub-agent.[68] The Rabbis then want to know whence agency may be derived in the case of marriage, for according to Jewish law a man may marry, i. e., become betrothed אירוסין, through an agent.[69] We cannot make an analogy from the case of divorce, because the latter suggests a distinct difference, inasmuch as it is a case of בעל כרחה, compulsion. The wife's consent is not necessary in the matter of divorce; we would therefore say that here agency applies, but in the case of marriage it does not. In answer to this, the rabbis refer to the two words in the same verse[70] ויצאה and והיתה "she departeth" and "she becometh" (another man's wife), and make a comparison between the two. Just as in the case of her "departing" (i. e. divorce) an agent may be created to represent the principal, so also in the case when "she becometh" the man's wife (i. e. marriage) an agent also may be appointed to represent him. The rabbis then ask: We learned that in the case of תרומה, the gift offerings that were to be set aside for the priest, an agent may set aside the gift for his principal. Whence do we

[67] Deut. 24.3.

[68] See later, p. 46.

[69] Below, p. 49. In rabbinic times there were two distinct stages in the marriage ceremony: (1) the Betrothal, *'erusin*, or acquisition, and (2) the marriage proper, *nissu'in*, the latter consisting in conducting the bride to the groom's permanent or improvised home. The betrothal carries with it almost all the legal consequences of marriage. It is the act of betrothal which might also be performed by proxies appointed by either the bride or by the groom, or by both.

[70] Deut. 24.2.

derive that agency is to be allowed here? We cannot infer this from the case of divorce, because the latter is an instance of חול a secular matter; here, we would say agency is permissible, but in the case of Terumah which is a sacred matter we would say that agency cannot apply. We derive the law, answers the Talmud, from the seemingly superfluous word גם "also" in the verse: כן תרימו גם אתם, "Thus ye *also* shall set apart"[71], and from this גם "also" we infer that agency applies here too. The rabbis then produce another instance, where agency is recognized, viz. the case of קרבן פסח the offering of the Paschal lamb. Again, they note that we cannot infer it from divorce, because that is a secular matter and here is קדשים, matter belonging to the realm of sanctity. It is deduced, they tell us, from the Scriptural verse referring to the slaying of the Paschal lamb ושחטו אותו כל קהל עדת ישראל "and the whole congregation of Israel shall kill it."[72] This verse does not mean, says R. Joshua b. Ḳorḥah, that the entire congregation had to kill it, one only did the slaying; but the Bible regards the act as done by, and in behalf of, the entire congregation, and thus we learn from Scripture that the act of the agent is the act of his principal. The Talmud proceeds in this manner, endeavoring to infer one case from the other, but comes to the conclusion that each case possesses some distinctive feature and must therefore find its own source in the Bible.[73]

FORMATION OF THE RELATION OF PRINCIPAL AND AGENT

There are various ways in which the legal relation of

[71] Numb. 18.28. For another inference from this word see below, note 123.

[72] Exodus 12.6. The three instances of divorce, marriage, and sacrifices form a combination from which all other cases of agency may in fact be derived. We have there the ordinary case of agency and the exceptional cases where no consent is necessary and where it pertains to sacred matters. The case of Terumah may be dispensed with, for while it is a sacred matter compared to divorce, it is secular in comparison to sacrifices.

[73] For an elaborate account of biblical proofs that שלחו של אדם כמותו compare Sifre Zuṭṭa (Ed. S. Horovitz, 1910), p. 87, 88.

principal and agent may be created: (1) by mutual agreement; (2) by estoppel, and (3) by subsequent ratification.[74]

(a) By mutual agreement

The relation of agency in Jewish law, as in modern law, is created immediately upon the authorization of the agent by the principal to do for him a certain act, and the acceptance of this authorization or appointment by the agent, either by express words or by proceeding upon the performance of the act so authorized.[75]

(b) By estoppel

The modern doctrine of estoppel may also be noted in the Jewish law of agency. The principal has the power to revoke his agent's authority to act in his behalf at any time he may so deem fit.[76] But suppose A held out B to be his agent to collect a certain debt due him from C, and before B collected the debt, A revoked his agency; suppose, furthermore, C not knowing of the revocation, paid the debt to B, then A has no further claim upon C.[77] His revocation, in so far as it related to C, can have no effect, and A is estopped from proving it because C can claim that, not having knowledge to the contrary, he had the right to rely upon the presumption that the principal had not revoked his authority.[78] The theory of estoppel is based upon the desire to do justice, so that where one of two parties must suffer, he who at first held out the agent as his and thus led others to believe that he was acting, with full authority, in his principal's behalf should be the

[74] So also in the English-American law; cf. Huffcut, p. 23. Agency by necessity or by operation of law (the *gesetzlicher Vertreter* of the German Civil Code) would come under the heading of שליח בית דין "agent appointed by court," not discussed here, as it comes under the law of אפיטרופוס guardianship.

[75] Maim. *ibid.* I, 1; Ṭur, *ibid.*, 182, 4; Sh. Ar. *ibid.*, 182, 1.

[76] Below, p. 60.

[77] Ḥosh. Mish., 122, 2.

[78] Cf. באר הגולה, Ḥosh. Mish., *ibid.*; cf. also below, p. 82.

one to suffer rather than the party who was absolutely innocent. It is no surprise, then, that the same theory should be applied in Jewish law. And so we note the case that where Reuben gives Simeon a power of attorney to sue Levi for a debt due him, and Levi goes to court with Simeon, but judgment is given in Levi's favor, Reuben cannot now come and claim that he had revoked Simeon's power to represent him before the suit began, and that, therefore, the judgment should be set aside.[79] As another example of agency by estoppel may be noted the תקנה decree of R. Gamaliel the Elder, that a husband who sends a bill of divorce by an agent should not revoke it, unless knowledge of revocation is given either to wife or to agent, the reason for such decree being מפני תיקון העולם public policy.[80] The clearest case of the formation of the relation by estoppel is the following: When A, in the presence of B, says to C: "I am B's agent", and B remains silent, B will afterwards be estopped from denying A's agency.[81]

(c) By ratification

The English Common Law has recognized the theory of "agency by ratification". Briefly the rule may be stated thus: Where one person, whether no agent at all or an agent exceeding his authority, does an act as agent in the name of or on behalf of another, the person in whose name or on whose behalf the act was done may ratify the act and thereby give to it the same legal effect as if the one doing it had been in fact an agent, or, being an agent for some purposes, had been in fact authorized to do the act in question.[82] Does the Jewish law of agency recognize

[79] Ḥosh. Mish., 122, 3.
[80] Giṭṭin, 32a, 33a.
[81] Gloss (הגהה) to Rosh, Ḳidd., 45b.
[82] Dempsey vs. Chambers 154 Mass. 330. The theory is based upon the maxim: Omnis ratihabitio retrotrahitur et mandato priori aecquiparatur. Every ratification relates back and is equivalent to prior authority.

this rule?[83] While the rabbis do not give concrete cases bearing upon this phase of the subject, it can be shown that the principle was not foreign to them. In fact there is a doctrine frequently stated in rabbinic law which recognizes the fundamental principle upon which the theory of ratification is based: זכין לאדם שלא בפניו, you may obtain a privilege or benefit in behalf of a person in his absence.[84] Accepting this principle, it would appear that where A purchased a piece of land in behalf of and in the name of B, B not having appointed A as his agent at all, yet when B learns of the purchase he may ratify the act, that this ratification will relate back and will be equivalent to a prior authority. B will be able to sue and be sued upon the transaction. The important element in the principle of ratification is that the would-be agent must do the act in the name of and in behalf of the person he desires to represent. If, however, he makes the contract or deal in his own name, not purporting to act on behalf of a principal, but having a secret intention to act, though without authority, for a principal, the contract so made cannot be ratified by the undisclosed principal.[85] It is this element especially that the rabbis recognize and discuss. The Ṭur[86] gives the following case, which may be in point: Desiring to prove that by the agent's acquisition of property in behalf of the principal (when he was told by the principal to purchase it for him), the property already belongs to the principal, and the agent cannot afterwards claim that he made a mistake and had meant to purchase it for himself,[87] the Ṭur makes this additional significant assertion: "If the agent purchases the article in the name of Reuben,

[83] C. M. Simmons, in his article on "Talmudic Law of Agency," *J. Quart. Rev.* VIII, p. 621, merely puts the question and answers that it is not definitely decided without giving any proof one way or the other.

[84] 'Erubin, 81b, a.fr.

[85] Huffcut, *l. c.*, p. 43. Cf. Principal case, Keighly v. Durant, 1901, App. Cas. 240.

[86] *Ibid.*, 183, 4.

[87] Cf. above, p. 26.

then, even if he gives his own money for the purchase price, he cannot later claim that he purchased the article for himself, once משיכה the act of transference had taken place, and he accepted the article in the name of Reuben". It is true that the Ṭur, in making this statement, meant it to apply to the former case where the agent was appointed by his principal. Nevertheless, I believe, that from the wording of this statement of the law, especially the emphasis upon the condition that "even if he used his own private money as the purchase price", the rabbis would follow the theory of ratification.

A still clearer case in point is the following, which even goes beyond the modern accepted theory of ratification, where the notion is that the third party does not know that the agent has no authority to act: "If A comes to sue C for a debt the latter owes to B, without having the הרשאה *harsha'ah* or power of attorney, the proof of his agency, without which he cannot force C to go to court,[88] then *even though he is at present not B's agent at all*, nevertheless if he offers to guarantee that he will later get the *harsha'ah* or authorization from B, C must recognize him and answer him in court, for we accept the principle זכין לאדם שלא בפניו "we may obtain a benefit in behalf of a person in his absence".[89] The following case must also be mentioned, for here the principle seems to be accepted to the fullest extent: "If Reuben purchases a piece of land from Simeon in behalf of Levi, whose agent he claims to be, and the deed is written in Levi's name, Reuben cannot afterward say: I purchased it for myself and want you to write another deed in my name.[90] The rabbis, it is true, base their ruling upon the theory that the seller ought not to be troubled to write an extra deed, but I believe that the

[88] Cf. *Ibid.*
[89] Isserles to Ḥosh. Mish., 122, 1.
[90] Maim. *l. c.*, II, 5; Ṭur and Sh. 'Ar. *ibid.*, 184, 3.

underlying principle is after all the desire to benefit a person, in whose behalf another undertook to act. And Isserles, in his gloss to this passage, expressly says: "Even though Levi never authorized or appointed Reuben to purchase the land for him, if Reuben did purchase the land in Levi's name, and paid for it with money that belonged to Levi, then the sale cannot be rescinded".[91] Were it not for this extra stipulation which the glossator required—viz. that the money should belong to the principal in whose behalf the act was done—this statement would coincide in every particular with the modern doctrine. That the rabbis accepted the principle of Ratification can be seen also from their statement of the reason for the law that if one finds an article in the street and takes possession of it in the name of another, it immediately belongs to the one in whose name and in whose behalf possession was taken. There the rabbis give as their reason that זכייה מטעם שליחות, when he takes possession in behalf of the other he makes himself an agent for him, and the law of possession that is applied here is the law that applies to agency.[92] A case where the principle of ratification is fully recognized is the following Where B, who is not appointed agent, learns from a hint that A would like to marry C and B performs the Ḳiddushin in behalf of A, C then becomes lawfully the wife of A.[93] The theory of ratification is also recognized by the Talmud in the case when one voluntarily takes possession of goods from a debtor in behalf of a creditor, though he was not requested by the creditor to do so (התופס לבעל חוב קנה). The rabbis allow such action where there is only one creditor, but refuse to sanction it where there are a number of creditors, not because they dispute the principle of ratification, but because of public policy, the injury

[91] *Ibid.*
[92] Cf. Tosfaot, B. Mesi'a 10b.
[93] Sh. 'Aruk Eben ha-Ezer, 35, 4; cf. above, note 69.

that will thus accrue to the others.[94] The clearest case and the most direct reference for Ratification is the following cited in the Shulḥan ʿAruk: "Where A sells real or personal property and B purchases and takes possession of the property or the article in behalf of C—C being ignorant of the transaction—it is in C's power to ratify the sale or not. If he ratifies it, the article belongs to him, if not the sale is nullified and the article belongs once more to A."[95]

There is, however, one important distinction between the theory of ratification as understood by the rabbis and as understood in the law to-day. The latter applies the rule not only where it works to the benefit of the principal but also to his injury or disadvantage and thus permits him even to ratify the tort of an agent; Jewish law clearly limits the theory to cases where it works to the principal's benefit only, the principle being זכין לאדם שלא בפניו ואין חבין לאדם שלא בפניו "we may benefit a person in his absence, but cannot add a burden upon him".[96] Says the Be'er ha-Golah, in commenting upon the above rule of law enunciated by R. Isserles,[97] that if the court sees that the agency will not benefit the party in behalf of whom he acts, then the agent will not be permitted to act for him. Even in agency by appointment, the principal can always say to his agent: לתיקוני שדרתיך ולא לעוותי "I have appointed you to benefit me, not to injure me"; in this case, where he has not even appointed him, he could surely make this claim. The Nimuḳe Yosef[98] expressly states, in speaking of a woman who desires to ratify the act of a man who, without her authority, accepted in her behalf a bill of divorce

[94] Giṭṭin 11b.

[95] Ḥosh. Mish., 235, 23, cf. באר הגולה, *ibid.* The source of this law is in Maimonides, Mekirah, ch. 30. The reading in the text, *ibid.* וזכה בהן הלוקח is evidently incorrect cf. Ṭur, Ḥosh. Mish., 235.25: כתב הרמב"ם ז"ל המוכר שנכר קרקע או מטלטלין וזכה בהן אחר הלוקח. In Maim. זכייה ומתנה 4.2, the same statement of the law is given with reference to gifts.

[96] ʿErubin 81b., cf. Huffcut. p. 300ff.

[97] To Ḥosh. Mish., 122, 1.

[98] To Yebamot, end cb. 15.

from her husband, that she cannot do so, even though she wishes it, because a divorce, generally speaking, does not come under the category of benefits to the principal.

Can the Third Person Recede before Ratification?

Can the third person recede from the transaction after he finds out that the agent had no actual authority to act for his principal and the latter had not yet ratified the act? This is a disputed point in modern law.[99] According to Jewish law, it is clear that he could not, for applying the rule of זכייה מטעם שליחות acquiring possession in behalf of another, in which it was said that the finder is regarded as an agent, we know that the article belongs immediately to the party in whose behalf it was taken, and not to the agent. Hence by analogy, if the agent does an act in behalf of another, without being appointed by him, immediately upon the performance of the act, we apply the rule זכין לאדם שלא בפניו "we benefit a person in his absence," and it is the same as if the principal had done it himself. The above quoted case in the Talmud, where one acts in behalf of a creditor, also gives evidence of the fact that the third party deals not with the agent but with the principal—even before the ratification—and, therefore, cannot recede from the transaction. But we need not come to this conclusion by analogy alone. The above quoted reference affirming the theory of ratification expressly states that יד הלוקח על העליונה the man for whom the purchase was made, i. e. the principal, has the upper hand. If he wants to ratify the act, the seller cannot recede from the transaction; if he does not want to ratify the act, he cannot be forced, and the article goes back to the third party.[100]

[99] In the United States. the third person may recede before the ratification; comp. Tounsend v. Corning 23 Wend (N. Y.) 435. See also 9 Harv. Law Rev. 60. In England the rule is that he cannot recede. Cf. Bolton Partners v. Lambert L. R., 41 Ch. D. 295.

[100] Ḥosh. Mish., 235, 23; cf. note 95.

Form of Appointment

(a) In Sheliḥut.

A *Shaliaḥ* or *Sarsor*, a gratuitous or paid agent, may be appointed by oral communication alone. The appointment does not need קנין *Ḳinyan* (the special symbolical form of making an agreement binding), nor does it have to be in writing or in the presence of witnesses.[101] As Maimonides puts it, witnesses can serve only where there is a conflict in testimony, to enable us to know who speaks the truth; or as the Talmud says,[102] quoting Rab Ashi, "witnesses are created only for liars", i. e. witnesses are not necessary to legalize the appointment of the agent, but only as a guard against faithless persons who might deny the transaction.[103]

(b) In Harsha'ah.

The *harsha'ah*, or power of attorney, is always in writing, and is given in a particular way. It is accompanied by קנין *Ḳinyan*,[104] the special symbolical act of seizure, by means of which the *Mursheh* becomes invested with all the power specifically defined in the instrument.[105] The שטר הרשאה *sheṭar harsha'ah*, or the written document, must

[101] Maim. I, 1; Ḥosh. Mish., 182, 1.

[102] Ḳidd. 65b.

[103] So also in Roman law, no fixed form is necessary to constitute a mandatum and verbal appointment is sufficient. D. XVII, I, 1, 2; cf. G. Leapingwell, *Manual of the Roman Civil Law*, 1859, p. 212. In the modern English-American law, too, oral authority is sufficient.

[104] Maim. III, 1; Ḥosh. Mish., 122, 4.

[105] In case the claim, for which the *harsha'ah* was given, was for money, kept by the third party, there was a peculiar form of *ḳinyan*, to mark the transfer of the claim As the law does not allow money to be transferred by the symbolical act, the principal would hand over to the attorney a little earth, and upon that the transfer of the claim was made. (Cf. Maim. III, 7; B. M. 45b, 46a; B. Ḳ. 104b.) The Geonim, however, saw the hardships of this, especially in the case where the principal possessed no land of his own. They, therefore, ruled that in such a case, the principal may transfer the claim without using the earth, applying the legal fiction, that he conveys it upon four ells of the portion of earth that every Jew is supposed to possess in the Holy Land. Maimonides was of the opinion that this legal fiction was resorted to so as more emphatically to impress the defendant; but where the third party refuses to recognize the *Mursheh* even where the קנין of קרקע was made, he cannot be compelled to do so, and the plaintiff must make the demand himself (Maim. III, 7). The Haggahot Maimuniyyot (*ibid.*), quoting R. Tam, say that the party's mere declaration that he has קרקע is sufficient.

contain this formula: זיל דון וזכי ואפיק לנפשך "proceed, litigate, acquire, and possess for thyself",[106] or words to that effect. If such words were not used, the defendant was not obliged to answer the attorney or to recognize him, and he could plead לאו בעל דברים דידי את "I have nothing to do with thee".[107] It must also conclude with the formula: כל דמתעני לך מן דינא עלי הדר "I am responsible for that which thou wilt expend for me in this suit".[108] This latter provision, however, is for the benefit of the principal, or *Marsheh*, as between him and the agent, to show that the latter, despite the formula (litigate and possess for thyself) cannot lay claim to what he acquires, but remains an agent and must hand over the article to the principal. If, therefore, this latter formula, with reference to the expense, is omitted from the document, it remains valid, and the third party can have no objection to it.[109]

We see, then, that the formula, "go to law, win and get for thyself", does not actually transfer or assign the claim to the *Mursheh*, but it is only a legal fiction, used to give him the right to sue, just as if the claim had actually been assigned. An interesting case must here be noted. A has a jewel in the possession of B and comes to B to claim it. The latter answers that C came to him with a *harsha'ah* written by A, making claim for it, and he returned it to C; but C later loaned it back to him and that therefore he is responsible to C alone, and is no longer responsible to A, The law decided that B must return the jewel to A, the rightful owner, for C, though he came with a *harsha'ah*, was no more than A's agent, and had no legal right to loan it to anyone.[110] The rabbis, however, cling

[106] B. Ḳ. 70a; Maim. Ḥosh. Mish., *ibid.*

[107] Maim. and Ḥosh. Mish., *ibid.* The Ḥosh. Mish., 122, 7, rules that even if the word דון "litigate" is omitted it is valid, as long as it contains the concluding phrase to be noted later.

[108] Ḥosh. Mish., 122, 6. Maim., *ibid.*, words the formula as follows: כל שתוציא בדין זה עלי לשלמו.

[109] Ḥosh. Mish., 122, 6. 7; Maim. III, 1.

[110] Isserles to Ḥosh. Mish., 122, 6, quoting Glosses of R. Mordecai.

to this legal fiction to the fullest extent. The document must show that the *Mursheh* will acquire for himself some part of the actual claim itself. And so they decree that if the *harsha'ah* states that the *Mursheh* acquires a third or a fourth part of the claim for himself (and not the entire claim), even then the third party cannot say: "I have nothing to do with thee", for a claim on a part gives you a right to make a claim on the whole.[111] But that is sufficient as long as the *Mursheh* has a right to acquire for himself an actual part of the claim. If, however, instead of a part in the claim, the *harsha'ah* gives to the *Mursheh* a definite sum, e. g. one hundred denars, for his services, even if this money is to be taken out of the money that is claimed, it will not be a valid *harsha'ah*. There must be an assigned legal claim to a definite part of the article claimed.[112]

PARTIES TO THE RELATION

General Rule

Any person, man or woman, may be a principal or agent, and even a married woman may be an agent. The rule includes also the Canaanite bondman or bondwoman of a Jew, for they are not regarded as Gentiles, but come under the category of Bene berit.[113] There are, however, two important exceptions to this rule: (a) One who is

[111] Maim. III, 2.

[112] If the party himself has an actual claim in the article, he naturally does not need a *harsha'ah* in order to bring suit. So a partner, or one of the heirs of an estate of which no partition has been made, could sue without a *harsha'ah*; their interests being joined, each is authorized to act for the others. (Cf. Maim. III, 3; note the difference, however, where one of the co-heirs or co-partners was absent from the city.) So also a husband cannot sue for property belonging to his wife alone, without a *harsha'ah* from her. If the controversy concerns those portions of his wife's property in which he has usufructuary rights, he can sue without a *harsh 'ah* (Maim. III, 4; cf. Gittin 48b).

[113] They are bound, like women, by all the negative commandments, and by affirmative commandments not applying to stated times only. While with reference to marriage they occupy a wholly different position from Israelites proper, yet they are regarded as a subordinate part of the Jewish community. They cannot, however, act as agents in marriage or divorce because the law of marriage and divorce does not apply to them.

deaf and dumb, insane or a minor,[114] cannot be either a principal or an agent.[115] (b) Neither can the עכו"ם, one who is an idol worshipper serve in either capacity.[116]

The exceptions to the rule:[117]

(a) A minor can under no circumstances act as a principal, nor can he appoint an agent even for those acts which he would be competent to do himself. Thus a wife who is a minor cannot depute one to receive her bill of divorce though she may receive it herself.[118]

On the other hand, it must be remembered that while a minor or one non compos mentis is barred from being an agent, yet for certain acts, such as those that are purely ministerial or mechanical in their nature, he may so act, if both parties have previously agreed that he should. Thus a minor may act as a messenger to carry money or goods for his principal to a third party, or vice versa, if the third party had previously given his consent.[119] In discussing the capacity of the minor to act as agent, the following interesting case is worth recording: A father sends his minor son with a bottle and a coin, of the value of a florin, to buy a shilling's worth of oil, and also to bring back the change. The shop-keeper gives the boy

[114] The minor in Jewish law refers to a boy under 13, or a girl under 12 years of age.

[115] Maim. II, 1; Ṭur and Sh. 'Ar. 188, 1.

[115] *Ibid.*

[117] In the modern law the question raised in this exception is a disputed one. Whether an infant may be a principal, earlier cases hold that action done by infant's agent are void (Tucker v. Moreland 1 Am. Lead Cas 247 note). Later cases deny, preferring the view of Chancellor Kent (2 Kent, comm. 235) that "the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants shall be deemed voidable only, and subject to their election when they become of age, either to affirm or to disavow them." As to the principal who is non compos mentis, there is also conflicting opinion. All modern cases seem to agree that any person may, as to the third person, act as an agent (Coke on Littleton 52a; cf. Huffcut, p. 34), unless, perhaps, one who is too young or too imbecile to perform at all the act in question (cf. Lyon v. Kent 45 Ala. 656). So infants and even lunatics and other incompetents may be the channel of communication between a principal and one with whom he deals. He himself, however, will incur none of the contractual liability attaching to an adult agent either to his principal or to the third person. Jewish law certainly appears to be more logical in dealing with these cases.

[118] Gitṭin VI, 3; Eben ha-'Ezer 141, 2, 3.

[119] Maim. II, 1-3; Ḥosh. Mish., 121, 1.

the oil and also the change from the florin. On his way home the boy breaks the bottle and loses the change. The rabbis decide that the shop-keeper is responsible for the loss of the oil and also for the change lost, because he should have understood that the father sent the child only to notify the shop-keeper as to what he wants, and it was the duty of the shop-keeper to have sent the oil with a responsible person.[120] In other words, the rabbis would deduce from this that a minor cannot act as an agent, even for a purely ministerial act, without having the express consent of the third party. Here he did have the father's implied consent, but that was not sufficient.[121]

(b) As to the second exception, viz. the idol worshipper, the rule must be studied a little more closely, in order to understand what the rabbis meant to decide. First of all, the above rule applying to the minor, appointed to perform a ministerial act with the consent of the third party, applies also to the 'Akum.[122]

Secondly, it is significant to note that the Talmud, in laying down the qualifications for the parties to the relation of agency, uses the expression, that the party must be a Ben berit, a son of the covenant,[123] and not the term ישראל Israelite. In fact, an attempt was made to word the rule: מה אתם ישראל אף שלוחכם ישראל "just as you are Israelites so your agents must be Israelites", but it did not succeed, and the wording Bene berit remained.[124] We

[120] B. B. 87b; Maim. II, 2.

[121] R. Judah (*ibid.*) disagrees with this decision, and holds that the father's act in sending the boy with the bottle was a sufficient consent on his part. The dispute is as to question of fact, not of law. As to the loss of the bottle itself, both are agreed that the father is responsible, because in giving the bottle to the child he wilfully ran the risk of its breaking. In rabbinic language the bottle was אבידה מדעת—out of his mind at the very moment he gave it to the child.

[122] Maim. and Ḥosh. Mish., *ibid.*

[123] Ḳidd. 41b. R. Yannai, commenting upon the seemingly superfluous word גם "also" (in Numb. 17. 28; cf. above, p. 29), says that from this word we derive the law that just as the principal must be a Ben berit, so also must the agent be a Ben berit.

[124] Cf. Gittin 23b.

have also noticed that the Canaanite bondman was allowed to act as an agent even though he was not an Israelite, because he came under the classification of Bene berit.[125] We may deduce from this, that the exclusion of the עכו"ם or heathen did not have the unanimous consent of the rabbis. In fact we have the clearest proof that there was a very strong effort made to include the 'Akum among the eligibles for the agency relation. It was reported, in behalf of Rab Ashi, that he limited the exclusion of the 'Akum from the rôle of agent only in the case of תרומה, perhaps because of its religious nature. In all other cases, the tradition has it, he allowed the use of an 'Akum as agent. Another tradition was reported to the effect that Rab Ashi prohibited them to act as agents for Israelites, but did allow Israelites to act as agents for them. The prevailing opinion, however, did not favor these traditions, and curtly declared בדותא היא "the tradition is not a truthful one".[126]

The rabbis, whose opinion in this matter prevailed, are not to be censured for their apparent exclusiveness. There was a valid reason—a religious reason, it is true—that prompted them to take this step. The agent, in Jewish law, frequently is compelled to take an oath.[127] The oath played a most sacred rôle in the life of the people, and there was no desire to force a non-Jew to comply with the strictness of that act. That this was the principal factor in swaying the rabbis in their decision barring the 'Akum from the rôle of agent, I believe, may be seen from the rabbis' wording of the law prohibiting an Israelite from entering into a partnership relation with an 'Akum, אסור לאדם שיעשה שותפות עם העובד כוכבים שמא יתחייב לו שבועה ונשבע בעבודת כוכבים שלו, "It is prohibited to join in part-

[125] Above, p. 39.
[126] B. M. 71b.
[127] See below, p. 68.

nership with an 'Akum, for the occasion may arise when an oath will have to be administered."[128]

In the case of *harsha'ah*, the law in this matter was relaxed, permission being given to confer the power of attorney also upon the 'Akum.[129] There is, in fact, a distinct historical reference to a *harsha'ah* that was given to a non-Jew by Rabbenu Tam and which was accompanied by the symbolical act of *ḳinyan*.[130]

An Assumption Worth Noting!

A fact that well illustrates how far ethical and religious principles were interwoven with purely legal discussion, is the statement made by the Talmud that we assume that a son will not delegate his father to serve him in a ministerial or operative act, the feeling prompting this assumption being that such a request would be disrespectful to parents.[131] This rule, however, would not apply to his appointment as agent in business transactions.

Eligibility of Agent Determined at Time of Appointment

A person may not be appointed as agent, if he is not eligible at the time of the appointment, even though he would become eligible at the time the act of agency was to be executed. Thus, if a man appointed a minor or one non compos mentis to deliver a bill of divorce to his wife,

[128] Sanhedrin 63b; cf. Ṭur, Ḥosh. Mish., 181, 1. We must also bear in mind that the status of agency undoubtedly had its origin in religious, at least in sacred relationship, as may be seen from the talmudic interpretation of the biblical authority for the agency relation (cf. above, p. 27). We can therefore understand that the non-Jew could not possibly be included. Indeed, for the same reason, the Jew could not serve as an agent for an 'Akum principal.

[129] Ḥosh. Mish., 123, 14. A slight changing in the wording of the document was, however, necessary. Instead of the phrase מיניה וקנינא only וקנה העכו"ם was to be written.

[130] Tosafot, Ḳidd. 3a; Ṭur, *ibid.*, 123, 15.

[131] Cf. Ḳidd. 45b לא חציף אינש לשוויה לאבוה שליח, the aversion was more to asking the father to act than in having him act. The reference quoted shows that a son may hint to his father that he would like to have a certain act performed. Cf. also the striking citation by R. Jacob Emden of Judges 14.3 (Emden to Ḳidd., *ibid.*).

then, even though at the time the divorce was delivered the minor became of age or the imbecile became of sound mind, the delivery was invalid and the divorce could not take effect.[132] If, however, the agent was qualified at the time of appointment, but afterward became incapacitated, and at the time of the performance of the act again became qualified, the appointment was valid. Thus, if, in the above case, the bill of divorce was delivered to the agent when he was of sound mind and later he became non compos mentis, if at the time he delivered the divorce to his principal's wife, he was again sound, then the appointment and the delivery are both valid, because, as the rabbis point out, תחלתו וסופו בכשרות "the beginning (i. e. the appointment) and the conclusion (i. e. the performance) were in time of eligibility."[133]

Joint Principals

As in the modern law,[134] so also in the Jewish law, two or more persons may jointly be the principals of an agent. Maimonides gives us the following illustration: Three men appointed Reuben as agent, and each gave him money, to purchase a certain article. Reuben spent only a part of the money given to him. The article will nevertheless belong jointly to the three who appointed him, even though it was Reuben's intention to purchase the article for only one of the principals.[135] This decision is based upon the principle that the money that was given to him was given jointly and was mixed together; it was therefore impossible

[132] Sh. 'Ar. Eben ha-'Ezer, 141, 32.

[133] *Ibid.*

[134] Cf. Perminter v. Kelley 18 Ala. 716.

[135] Maim. Hilkot Mekirah VII, 13, 14. Cf. B. Mesi'a, 74a. The RaMA adds that this decision will be the same even if the agent had expressly said to the seller that he was purchasing the article for only one of the principals (cf. Ṭur, *ibid.*, 184, 1). R. Isaiah (quoted by the Ṭur, *ibid.*), however, carrying the doctrine of renunciation to an extreme, says that if the agent, before the purchase, expressly says that he is going to purchase the article for one of the parties alone, the purchase will belong to him, because this statement implies that he renounces his agency for the others. R. Isaiah's view, however, is an isolated one, and is not accepted as the general law.

for the agent to take part of this mixed sum and with it to serve only one of his principals. If, however, each of the principals gave him his money separately, the money being separately wrapped or sealed and distinctly marked, in that case, if he purchased the article using only part of the money, the article will belong to the party whose money was used as the purchase price, even though he had intended that the article should belong to all.[136] The difference in the two cases is a difference in fact—in the first the principals were joined, and therefore he could not serve one at the expense of the others; in the second case, the appointment was joint and several, and he therefore could serve only one of the parties. The pupils of the Rashba (R. Solomon ben Abraham ibn Adret), discussing the rule as laid down by Maimonides, give us this clearer illustration of joint principalship. If the three principals gave the money in the presence of each other, then it is as if the moneys were mixed together, and the agent must serve all of them or none. They are then like partners, and the agent cannot renounce part of his agency. If, however, each of the principals gave the money separately, not in each other's presence, then it is a joint and several agency, and he is at liberty to serve one and renounce the agency of the others.[137]

Joint Agents

Just as there may be joint principals so, too, there may be joint agents, i. e. two or more persons may be appointed by the principal to perform the same act. When the agents are joint, the execution of the agency must be joint.[138] Whether in a particular case the agency is joint or several is a question of fact, and will depend upon the

[136] *Ibid.*

[137] Cf. Bet Yosef to Ṭur, 184, 1.

[138] Cf. Isserles to Ḥosh. Mish., 122, 3; so also in English law; cf. Commonwealth v. Canal Commissioners 9. Watts (Pa.) 466.

circumstances surrounding the appointment. Thus, if a man, while in a dangerous condition, says to a group of men standing by: "Take for me a bill of divorce to my wife", then anyone of the men may act as agent for him.[139] If, however, he said to the group: כלכם הוליכוהו "All of you take for me the divorce to my wife", then the act must be done jointly by all the people in that group.[140] The former is a case where the agency is several; the latter an example of joint agency alone.

Delegation of Authority

Can the agent appoint a sub-agent to perform the act for which he was originally appointed, and thus make the principal responsible for the sub-agent's action? There is some confusion in the rabbinic decisions as to the answer, but on closer examination we shall see that they agree with the view accepted by the English Common Law.[141] We noted above[142] that from the double use of the word ושלחה,[143] the rabbis deduce the law that an agent may appoint a sub-agent. But this inference must not be understood to apply in all cases. What the rabbis there meant to imply was that this law may be deduced to apply in some special cases, in other words that this was to be the exception to the general rule, viz.: that, unless the principal gave his sanction, an agent may not entrust the performance of his duties to another. The very case that the rabbis were there considering was exceptional; it was the case of divorce, and there, they say, a man's agent

[139] Shul. 'Ar. Eben ha-'Ezer, 141, 21.

[140] *Ibid.*, 141, 23.

[141] The general rule is: Delegatus non potest delegare. Exceptions to this rule are to be found when the principal grants the power, or where there is an implied power to delegate the authority. Also, where the acts are merely mechanical, clerical or ministerial, involving no judgment or discretion. Cullinan v. Bowker, 180 N. Y. 93; 72 N. E. 911; Lyon v. Jerome, 26 Wend 485, 37 Am. Dec. 271.

[142] Above, p. 28; cf. Ḳidd., 41a.

[143] In Deut. 24, 3.

could appoint a sub-agent, because it is a case of בעל כרחה where the wife's consent is not required. She is in fact not a third party to deal with at all, as she is not asked whether she desires to receive it or not. In other words, the act on behalf of the agent is purely ministerial, and, as in modern law, where the act to be performed is only ministerial, the authority to execute it may be delegated. Even where the act is purely ministerial, where the principal expressly states that the agent himself is to perform the action, the power cannot be delegated. Thus, where the husband says to the agent: אתה הולך "You deliver it",[144] he must do the act himself, unless an accident overtakes him on the way, or he becomes seriously ill, when the authority may be delegated.[145] If, however, he expressly commands him not to permit any one else to do the act, he cannot delegate, even in the case of accident or sickness.[146]

Where the agent, on the other hand, is required to exercise discretion, judgment or skill, or where it may be seen that the agent's appointment is due to the confidence that the principal reposes in him, he cannot delegate the performance of his duties, without the consent of the principal. Thus it is the prevailing opinion that an agent appointed to give Ḳiddushin to a certain woman, in behalf of his principal, cannot appoint a sub-agent to do it for him.[147] So, also, where the principal has appointed one to hold an article for him, the agent cannot appoint a sub-agent without the principal's permission,[148] because of the confidential character of the relation. The principal may say: אין רצוני שיהא פקדוני ביד אחר "I trusted you, but I

[144] According to some authorities, even if he said: הולך "Deliver," he must do it himself.

[145] Eben ha-'Ezer, 141, 38.

[146] Cf. Isserles, *ibid.*

[147] Isserles, quoting Glosses of R. Mordecai, Eben ha-'Ezer, 36, 5; *ibid.*, 36, 5; cf. note 69.

[148] Ṭur, Hilkot Pikḳadon, 291, 24.

would not trust another". It is for the same reason that the law holds that a *Mursheh* cannot delegate his power of attorney to another.[149] As the *harsha'ah* is almost always given to sue for a definite article, the principal can say, also here: "It was my desire that you take it, but I did not want anyone else to lay hands upon it".

The rabbis give us the explanation of this divergence in ruling because מילי נינהו "they are words"[150], and there is an express ruling in the Talmud: מילי לא מימסרן לשליח "an agent may delegate an act to a sub-agent but he may not delegate words that are to be spoken or consent that is to be given or asked"[151]—which is but another form of the way modern law makes the distinction. Thus B, appointed by A to give Ḳiddushin to C, cannot delegate his authority to D, because his act depends upon the consent of the third party. If, on the other hand, B is appointed to give a get (bill of divorce) to C in behalf of A, he may delegate this act to D, because the act which is purely ministerial, consists in transmitting through another a tangible object, and does not require any words to be spoken nor consent to be asked. So, too, the wife's agent, appointed to receive the get, cannot appoint a sub-agent, because the action depends first of all upon the consent or will of the husband,[152] and secondly because that which he imparted to the agent was only words.

The sub-agent, where the authority to appoint one is given, is in the same legal status as the first agent, and can, of course, not appoint a second sub-agent, without the consent of the principal.[153]

[149] Maim. *ibid.*, III, 8; Ḥosh. Mish., 123, 4. He can, of course, if he gets the express consent of the *Marsheh*.

[150] Cf. Sh. 'Ar. Eben ha-'Ezer, 36, 5.

[151] Giṭṭin 29a.

[152] Cf. Bet Shemuel to Eben ha-'Ezer 35, 6, for a difference in interpreting the word מילי by the מרדכי "Mordecai", and הגהות מרדכי "Glosses of Mordecai" in the name of הקדוש מרדוש, the "Saint of Dreux."

[153] Eben ha-'Ezer, 141, 39.

PURPOSE OF THE RELATION

General Rule

The general rule deduced from the principle שלוחו של אדם כמותו "A man's agent is like unto himself", may be thus stated—that an agent may be appointed to do everything that a principal could do himself.[154]

This rule goes further in its application than does the modern English law. The latter does not apply the rule to certain acts, which because of their nature or because of a matter of policy, are required to be performed by the person himself. Thus, for instance, the law does not tolerate the substitution of an agent or representative to perform the rite of marriage.[155] In the Jewish law, agency does apply to marriage, and in fact it is safe to presume that the whole law of agency developed from the law of marriage and divorce.[156] Not only could the man marry by proxy, but the woman, too, could appoint an agent to represent her in the marriage ceremony.[157] While this practice of marrying by proxy was quite common to the whole of medieval Europe,[158] it is very seldom practised to-day. There is, however, an interesting American record of such a marriage, worth relating. The Rev. Joseph Jessurun Pinto, who was Minister of the Congregation Shearith Israel of New York in the Revolutionary Days, fell in love with Rebekah, the daughter of Moses de la Torre, of London. Before she came to New York he sent a commission to Dayyan de Crasto, of London, to give Ḳiddushin to Miss de la Torre for him. She was thus married to him in London, while he remained in New

[154] See above, p. 40, where a minor cannot appoint an agent even for that which the minor can do himself.

[155] Cf. Mechem's Agency, par. 126. Exception was at times made in the case of princes, *ibid.*

[156] Ḳidd., 41a; cf. above, p. 27 f., and note 69.

[157] Eben ha-'Ezer, 35, 1; 36, 1. Every condition that the principal made in the appointment must be fulfilled to the very letter, *ibid.*, 35, 7.

[158] Cf. I. Abrahams, *Jewish Life in the Middle Ages*, p. 176.

York.[159] Whether both could marry by proxy at the same time is a disputed question. The prevailing opinion does not permit it.[160]

Just as in the marriage rite, so, too, does agency apply in divorce. A man may appoint an agent to deliver the get to his wife, and the wife may appoint an agent to accept the get in her behalf.[161] All the laws that apply to the principals in the case of divorce apply with equal force to the agents.[162] The prevailing opinion here, too, is that the wife cannot appoint an agent to receive the get from an agent of the husband.[163]

Limitation to General Rule

The general rule stated above calls for one limitation and one important exception.

The limitation to the rule is as follows: Whether a certain act can be performed by an agent will depend upon the validity of the act at the time of appointment and not at the time of performance. A man cannot appoint an agent to do that which he could not do himself at the time of the appointment of the agent, although he might have been able to do it afterwards. Thus A appoints B as agent to marry for him C, whom he believes to be divorced. C, however, is not divorced at the time of B's appointment, but is divorced at the time when B reaches her. B cannot

[159] Cf. "Items Relating to the History of the Jews of New York," by N. T. Phillips, in *Amer. Jewish Historical Society*, Vol. XI, p. 153. I am indebted to Dr. Cyrus Adler for calling my attention to this reference; cf. also the very interesting American case, In re: Lum Ying, U. S. Dist. Ct., 1894—59 Fed. Rep. 682, which deals with the validity of a marriage of a Chinaman, domiciled in U. S., with a Chinawoman, resident of China, through an agent. No actual decision is made in this point, but the question is discussed.

[160] Eben ha-'Ezer, 36, 12.

[161] *Ibid.*, 140, 1; 140, 3.

[162] *Ibid.*, 140, 2 and 3.

[163] *Ibid.*, 141, 1, end, and באר הגולה *ibid.*, but cf. Giṭṭin 63b and the Rosh, *ibid.*, who, in name of Hai Gaon, gives contrary opinion. It was not the intention of the writer to elaborate on these laws, as they are already discussed by those who wrote on the Jewish law of marriage and divorce. Cf. D. W. Amram, *Jewish Law of Divorce*, M. Mielziner, *Jewish Law of Marriage and Divorce.*

marry C for A. The fact that C was a married woman at the time of B's appointment invalidates his agency. The general maxim on this point is thus expressed in the Talmud: לא משוי אינש שליח אלא במלתא דעביד השתא, במלתא דלא מצי עביד ליה השתא לא משוי שליח "A man can only be appointed to do an act, which may be performed at the time of appointment."[164]

Exception to General Rule— Illegality of Act

The one important exception to the above rule is that the appointment of agency must not contemplate an illegal object. Accordingly, an act, which, if done by the principal, would be illegal, cannot be done through the agency of another, and such appointment is consequently void. Modern law, too, recognizes this principle. "There can be no such thing as agency in the perpetration of a crime, but all persons actively participating are principals".[165] The Talmud expresses it: אין שליח לדבר עבירה "There can be no agency for wrongful acts," i. e. he who commits a wrongful act, under the direction of his principal, is himself responsible for it. The reason for this rule is that the authority of the principal cannot justify an act prohibited by the divine authority of the law, or, as the rabbis expressed it: דברי הרב ודברי התלמיד דברי מי שומעין "If the Master's (God's) words conflict with the pupil's (the principal's) words, to whom should you give heed?"[166]

Thus, in all cases where the act done is illegal, the doer of the act is alone responsible, and the man who ap-

[164] Nazir 12b. דרכי משה Ṭur, *ibid.*, 182, 1.

[165] Pierce v. Toote, 113 Ill. 228; Leonard v. Poole, 114 N. Y. 371. He who executes the criminal act is particeps criminis with the principal who directs it; cf. Mechem's Agency, § 121. So also in Roman law, Rei turpis nullum est mandatum, D XVII 1, 6, 3; Inst. III, 26, par. 7, 13.

[166] Ḳidd. 42b. The Talmud also builds up this rule by emphasizing the demonstrative pronoun ההוא "that," in Leviticus 17.4, דם יחשב לאיש ההוא "it shall be reckoned sin to that man only."

pointed him or authorized him to do it bears no responsibility. While this is the accepted law, the Talmud shows that there was a strong opposing view held by Shammai the Elder, who did not admit this exception to the general rule, but held that when a man directed a crime, the principal should bear the responsibility for his agent's act, quoting as support for his contention the words spoken by the Prophet Nathan to King David ואתו הרגת בחרב בני עמון "Him hast thou slain with the sword of the children of Ammon",[167] although it was not David himself who killed Uriah, but his representative Joab, who carried out David's instruction. But even Shammai adds a limitation to his view, viz. he would hold the principal liable only in the case where the agent derives no personal enjoyment from the act. Shammai, too, holds that a sinful act, the nature of which consists in the enjoyment derived therefrom, cannot be imputed to the principal and the doer of the act himself must bear the responsibility. Thus, an example of a purely religious act is given: If A said to B: Go and eat forbidden food, A is not held responsible—the principle being לא מצינו בכל התורה כולה זה נהנה וזה מתחייב "we do not find in the Torah any case where one can enjoy the fruits of the act and the other is to bear the responsibility".[168]

We must note here the very inclusive nature of the word עבירה "transgression" or wrongful act. It includes all acts that are sinful, i. e. opposed to the laws of the Jewish religion, and also all acts that are criminal in their nature. Whether the act done by the agent was to marry a divorced woman for the principal who happened to be a priest,[169] or whether the act done was to kill a human being at the

[167] II Sam. 12, 9, cf. Ḳidd. 43a. See S. Zeitlin, "The Semicha Controversy Between the Zugoth," *Jew. Quart. Rev.*, New Series, VII, p. 510, for an ingenious suggestion that this statement must be attributed to שמעיה Shemaiah instead of to Shammai. Cf. also I. H. Weiss, Dor Dor we 'Dorshau, I, 142, for an interesting historical interpretation of Shammai's view.

[168] Ḳidd., *ibid.*

request of another[170], makes no difference in the application of the law. Both come under the category of עבירה wrongful or illegal acts, and there is no responsibility on the part of the principal.[171]

The rule אין שליח לדבר עבירה goes even further than that. It applies also to torts or civil wrongs, which arise from negligence or carelessness of an agent or servant in the performance of his duty.[172] While this is contrary to our modern English practice, and may seem somewhat harsh in its rulings, it must be said, in its favor, that it is logical and carries out the purposes for which agency has been established.[173] It must here be noted that many modern jurists of note admit that the English rule "respondeat superior" is illogical and contrary to reason. Thus Sir William Anson, in his work on Contracts, says: "It would be interesting to inquire how far the doctrine of representation in such cases is of modern origin. It may be that the extreme form which Employer's Liability has assumed in English law is an application to modern society of rules which are properly applicable when the master is served by slaves and is liable for injuries done by them, as being part of his property".[174] So also do others, while attempting to find out the basis of the principal's liability in all such actions, admit that the ruling is altogether opposed to reason, and as one writer says,

[169] Cf. *ibid.*, 42b.

[170] Cf. *ibid.*, 43a.

[171] So when one injures or kills another in compliance with the latter's own request or command, the criminal will be found guilty even without malicious premeditation. Cf. B. Ḳ. 92a.

[172] Cf. Ṭur, Ḥosh. Mish., 396, 7. This is contrary to the later Roman and to the modern English law. The Roman law in later stages holds the principal responsible with respect to carelessness or negligence of agent or servant in the course of his duty, applying the maxim: "Respondeat superior," let the principal be held responsible (4 Inst. 114), cf. Pollock on Torts, 5th ed., p. 72ff.; Bigelow on Torts, 7th ed., p. 79, 82.

[173] The Sadducees held to the Roman view of Respondeat superior, cf. Mishnah Yadayim IV, 7. Cf. also I. H. Weiss, Dor Dor we'Dorshau I, 111.

[174] Anson's "Contracts," p. 20.

shows "a conflict between law and common sense".[175] "The doctrine of to-day", he continues," took shape under Lord Holt in a conscious effort to adjust the rule of law to the expediency of mercantile affairs.... His reasons are in substance covered by his brief sentence in Wayland's Case. 'It is more reasonable that he should suffer for the cheats of his servants than strangers and tradesmen' ".[176] The Jewish law clings tenaciously to the logical outcome of its rulings and refuses to yield to expediency. For that reason even in the extreme case where A appoints B to dig a pit in a public path, and C is thereby injured, the principle אין שליח לדבר עבירה is applied, and B primarily is held responsible.[177]

In discussing the legality of the act in agency, it is also interesting to note, in passing, a difference of opinion between the Jewish and the modern law with reference to the Shadkan or marriage broker. The English law regards such marriage brokerage as opposed to public policy and therefore the appointment of one is held to be void, even though in the given case no fraud was practised on either party.[178] The Jewish law included the Shadkan in the class of lawful agents,[179] and, indeed, he played a most important rôle in the life of the people, especially in the middle ages, down to almost recent times.[180]

Exceptions to the Exception

There are, however, certain cases where the rule אין שליח לדבר עבירה does not apply. Thus Rabina limits

[175] Cf. J. H. Wigmore, "History of Tortious Responsibility," in *Select Essays in Anglo-Amer. Legal Hist.*, Vol. III, p. 529f.

[176] Wayland's case, 3 Salk. 234, quoted by Wigmore, *ibid.* The Jewish law was evidently also swayed by public policy, as can be seen from the law that where, in such cases, the agent cannot pay, the principal is then made to pay; Cf. R. Falk Cohen [סמ"ע] Ḥosh. Mish., 292, 9, quoted by שדי חמד 192, כללים א, evidently agreeing with Lord Holt's contention, that in such case, where the agent could not make good, it is more reasonable that the principal should suffer than the innocent stranger.

[177] Cf. B. Ḳ. 51a; Ḥosh. Mish., 410, 8. See also *ibid.*, 348, 8, note of Isserles.

[178] Crawford v. Russel, 62 Barb (N. Y.) 92.

[179] Cf. Isserles, to Ḥosh. Mish., 185, 10; also ט"ז *ad loc.*

[180] Cf. Abrahams, *Jewish Life in Middle Ages*, p. 173.

the application of this rule only where the representative is a בר חיובא a responsible party.[181] Rab Sama, on the other hand, limits the rule to cases אי בעי עביד ואי בעי לא עביד, where the agent can use his free will either to do or not to do the act. Where the agent is compelled to do the act, even against his will, the rule will not apply and the principal instead of the agent will be held liable.[182] Examining both of these theories we must come to the conclusion that Rab Sama's is far more logical and is by far the better statement of the law. Indeed, the Rosh, quoting R. Meir ha-Levi, says that the statement of the law which we accept is the one given by R. Sama, and gives as proof a corrected reading of the text, to wit: that Rab Sama presented his view in the presence of Rabina, in the name of R. Iwya, and we have no record of a denial of this statement by Rabina. The silence on the part of Rabina is regarded by the commentator as an admission that Rab Sama's is a true statement of the law.[183] Rabina's view could apply only in the performance of religious acts;[184] Sama's

[181] B. M. 10b. It is quite difficult to give a proper English equivalent to this Hebrew expression as used in this connection. In applying it to religious acts, it would mean one who is obligated either to perform, or to abstain from these acts. Applying it to civil or criminal acts, the meaning is not clear at all. It cannot refer to one who is not responsible legally, e. g., a minor or non compos mentis, as the rules of agency do not apply there. The only example—other than those of a purely religious significance—given by Rabina is the case where the stolen article is found in the court-yard belonging to the thief, and it is regarded as if found in the hands of the thief because the court is viewed as the thief's agent. The court is, of course, not responsible for acts done therein.

[182] *Ibid.* In both these views, the underlying thought is that it cannot here be said דברי הרב ודברי התלמיד דברי מי שומעין that he was to obey the Master's words and not the words of his principal—in the former, the master's words did not apply to him; in the latter, he was not at liberty to make his choice.

[183] Cf. Rosh, *ibid.* See also גליון הש"ס B. M. 10b.

[184] The Talmud indeed attempts to offer cases of civil and criminal nature to illustrate instances of לאו בר חיובא non-responsibility, but without success. Cf. B. Mesi'a 10b; האומר לאשה ועבד צאו ונבו לי in which a married woman and a slave are offered as examples of לאו בני חיובא, but where the answer is given that legally speaking the אשה and עבד, though in their present status unable to pay damages, are nevertheless regarded as בני חיובא responsible with payment deferred until slave is emancipated or woman freed of marital tie. R. Akiba Eger, commenting upon this suggested case of th Talmud, offers a better and more striking answer, viz.: that the reason we say one is not a בר חיובא is because the principle דברי הרב ודברי התלמיד does not apply to him. But here, the עבד and אשה must also pay heed to "the words of the Master," for they, too, are prohibited to steal; hence they are בני חיובא responsible. But this

interpretation applies to all cases of the law.[185]

A logical corollary to be deduced from the above statement of the law is the further exception to the general rule that where the Shaliaḥ did not know the act was an עבירה or wrongful— where, for example, the undertaking was lawful on its face, and the agent was ignorant of the facts or the purpose which alone rendered it unlawful—the act does not become affected by its illegality and the status of agency remains established.[186] Thus, suppose a thief came to an innocent party and asked him as a favor to remove an ox from a certain barn, which he claimed belonged to him, and to watch it for him. The ox was, in fact, not his but belonged to another. The man complied with the thief's request, and after he removed the ox, it died. The Talmud rules that from the moment the agent removed the ox, it was the act of the principal and the thief alone was therefore responsible.[187] The agent, believing that the ox belonged to his principal, and therefore that he had a legal right to remove him, is not affected by the actual illegality of the act, because the principle of the master's command conflicting with his principal's does not apply.

comment, while striking, is unnecessary, as the Talmud itself (*ibid.*) shows that they are responsible, else why should they pay afterwards?

[185] The Talmud's effort to prove that there is a practical difference in the application of these two rules (B. Mesi'a 10b) seems to me to be far-fetched. As to the question of the חצר both rules would equally apply—the חצר is not a בר חיובא, but it is also not able to express its own will, hence it is not in the category of אי בעי עביד ואי בעי לא עביד. Even in the cases given—of a religious nature, where the Talmud does make out a case of difference in application—it can be seen that the Talmud stretches the terms used to an unwarranted degree. Thus, where the Kohen asks an Israelite to marry for him a divorced woman, the Talmud says that the agent here is לאו בר חיובא, but does possess freedom to choose whether to do the act or not. Hence says the Talmud, according to Rabina, the Kohen or principal would be responsible. According to Rab Sama the agent alone would be responsible. But to say that the agent is not a בר חיובא simply because the particular law of marriage does not apply to him personally but only to the priest, is begging the question. It would be far more logical to say that he, being the Kohen's representative, acting for the priest, is legally a בר חיובא, and hence he should be responsible. Perhaps this is what the Rosh (*ibid.*) meant when he said, in conclusion: הלכך לא משכחת שליח לדבר עבירה אלא בחצר. Cf. also Tosafot B. Ḳam. 79a bot., for a similar forced interpretation.

[186] Ḥosh. Mish., 182, 1; באר הגולה *ad loc.* So also in modern law; Cf. Roys v. Johnson 7 Gray (Mass.) 162.

[187] Cf. Tosafot to B. Mesi'a. 10b; cf. also באר היטב to Ḥosh. Mish., 348, 10.

Further Exceptions—Particular Cases

In addition to the general rules enunciated by Rabina and Rab Sama, limiting the application of the law with reference to the illegality of the action, the Talmud also enumerates a few special cases, not at all in the class of Rabina's and Rab Sama's exceptions, which are, nevertheless, not affected by the rule אין שליח לדבר עבירה. There is first the case of מעילה or the inadvertent conversion of Temple property to profane use. There, if an agent committed the act in behalf of his principal, the latter is held responsible, despite the fact that the act was illegal. The Talmud there points out that this exception is based upon the use of גזרה שוה a similarity of phrase in two verses of the Bible.[188] The fact of the matter is that the case of Me'ilah presents no further exception, but is another example of the case just discussed where the agent does not know that the act is prohibited. The very act of Me'ilah implies not knowing that it is sacred.[189]

Another exception to the rule[190] is the case, where an animal that was stolen was sold or slaughtered by the thief's representative. There the rabbis decide that the thief must pay the penalty of ארבעה וחמשה four or five times its value, and not the agent, despite the fact that the act of the agent was illegal.[191] But here again the rabbis do not rest their case upon legal principle, but upon an analogy between the two cases, embodied in the words וטבחו או מכרו "and he kills it or sells it".[192] Just as in selling, two parties are necessarily implied, the seller and the purchaser, so, too, say the rabbis, in the case of slaughtering, two

[188] Ḳidd., 42b. The reference is to the similar use of חטא in Lev. 5. 15, and Num. 17. 32.

[189] Cf. Tosafot Ḳidd. 42b, bot.

[190] Simmons (cf. note 83) mentions only the מעילה case, and says that is the one exception. He evidently overlooked this and the following case.

[191] B. Ḳam. 79a; cf. *ibid.*, 71a. Ṭur, Ḥosh. Mish., 350, 4.

[192] Exod. 21, 37.

parties (the principal and his representative) may be implied.

Mention must also be made of the case taught by the school of Hillel, that where a man was entrusted with the keeping of an article and he authorized another to convert it or to misappropriate it, the principal would be held liable,[193] though the illegal act was actually committed by the agent. But here again they make use of a special verse in the Scriptures[194] to permit this exception.

Lastly must be mentioned the very interesting case cited by Isserles in his glossatory comments to the Shulḥan 'Aruk that where a man delegates another to act as informer against a certain person, if the man thus delegated had the reputation of being an informer, then the principal in this case, i. e. the man who thus instigated the informer to do his work, will be held guilty. But here again, the exception is not really an exception to the general rule. For as one of the rabbis well notes, as soon as the principal gave the information to the professional informer, he already was guilty of a crime, because, having told it to a reputed informer, he should have foreseen the consequence of his act.[195]

TERMINATION OF THE RELATION

When Purpose of Agency is Accomplished

The relation of agency is terminated as soon as the act, for which the agent has been appointed, has been performed. As to what constitutes performance will, of course, be a question of fact, and will depend upon the nature of the transaction, usage and custom. Thus, the

[193] B. Mesi'a 44a; Ḳidd. 42b; Ṭur, Ḥosh. Mish., 292, 7.

[194] Exod. 22, 8, the words על כל דבר פשע. It is interesting to note that the פרישה (commentary to the Ṭur by R. Joshua Falk Kohen, *ibid.*, 297, 7) does not accept this ruling, and says that Beth Hillel must have meant it to apply only in a case where the agent did not know that the article did not belong to the principal.

[195] Isserles to Ḥosh. Mish., 388, 15. Cf. פתחי תשובה *ibid.*, quoting the Ḥatam Sofer.

case of the Shadkan presents an interesting illustration. Whether he will be entitled to his fee or brokerage as soon as the parties agreed to marry or only when the marriage actually takes place, will depend upon the custom in vogue in the particular locality.[196] Where there is no particular custom, the time when the marriage takes place is when the relationship is terminated. Where the custom is to wait until the wedding day, or where no custom at all prevails, the Shadkan has no claim where the parties afterward receded from their compact.[197]

The case of divorce gives us another good illustration. If the principal appoints an agent to deliver a bill of divorce to his wife, she is not divorced, until the agent actually delivered it to her. Until then, the principal may revoke and the agent may renounce his power.[198] In the case where the wife appoints the agent to receive the get, just as soon as the agent receives it in his hands, the divorce takes effect, and the relationship terminates then.[199] She can no longer revoke and he can no longer renounce his authority. Where, however, she appoints the agent to accept the get and to deliver it to her, the divorce becomes effective, only when it is delivered to her, and the relationship is not terminated before.[200] Until she receives it herself, she may revoke the power of the agent.

Revocation by Principal

The principal has the power to revoke his agent's authority at any time, with or without a good excuse, and

[196] Isserles to Ḥosh. Mish., 185, 10.

[197] Idem.—unless previously agreed otherwise. As was stated above, custom differed in this matter, thus, Isserlein (פסקים וכתבים 85) says: "When the match is made the Shadkan's work is done and his wages earned. But in our place, we are not wont to pay the Shadkan's fee till the marriage is celebrated. Elsewhere they pay immediately the contract is drawn up הושם הקנס."

[198] Eben ha-'Ezer, 140, 1. Cf. Giṭṭin IV, 1.

[199] *Ibid.*, 140, 3.

[200] *Ibid.*, 140, 5.

whatever the agent does after revocation is not binding upon the principal. This applies to the case where a power of attorney has been conferred as well as in ordinary agency.[201] While he has the power to revoke, he must see to it that the revocation is brought home either to the agent,[202] or to the person with whom he deals, otherwise he will be responsible for his representative's dealings.[203] It follows, then, that where the principal appoints a second agent to do the act for which the first agent was appointed, he thereby revokes the authority of the first. Thus, where A gave to B a power of attorney and later gave another *harsha'ah* to C; both B and C appear before D with the claim. The law says that D must recognize C, the second appointee, because the latter appointment implies the revocation of the first.[204]

This power of revocation is given to the principal on the theory that inasmuch as the relationship is of a confidential nature, he has the power to select whomsoever he pleases and to terminate his authority whenever he so pleases. Where the agent is a gratuitous one, and therefore suffers no loss because of the revocation, the principle holds good. But what of the *Sarsor*? Suppose he has already undertaken the performnce of the transaction, can his authority to continue in that case also be revoked? The law does not gives us an answer to this question. It seems to me, however, that we may infer what the ruling of the rabbis would be from the very similar case of פועלים day laborers. Either party there has a right to withdraw from the transaction. But it is clear from the statement of the law, that they have this right only before the laborer com-

[201] Maim. III, 8; Ḥosh. Mish., 122, 3. So also in Roman law; cf. G. Leapingwell, idem, p. 248; and in modern English law; cf. Hartley's Appeal, 53 Pa. St. 212; Burke v. Priest 50 Mo. App. 310; Conley v. Dazian 114 N. Y. 161.

[202] Isserles to Ḥosh. Mish., 122, 3, end.

[203] See above, p. 30; cf. Maim. III, 10; Ḥosh. Mish., 122, 2.

[204] Ḥosh. Mish., 123, 3; cf. for a similar ruling Copeland v. Mercantile Ins. Co. 6 pick (Mass.) 198.

menced his work, because neither would then suffer any loss. If he already commenced his labors, then the master cannot discharge him unless he pays him as in the case of an idle laborer פועל בטל.[205] Applying the same rule we would say that the principal can revoke at all times, even in the case of the *Sarsor*. But where the *Sarsor* would, by the revocation, suffer a loss, the principal would be made to pay him the amount of his loss.[206]

Exceptions to the Rule of Revocation

An important exception to the general rule, permitting the principal to revoke the authority of his agent, must here be noted. When the principal hands to his agent a deed of gift, as, for instance, a deed of manumission for delivery to his bondman, the principal cannot revoke his representative's authority and the deed cannot be recalled.[207] The exception here is based solely upon the passion for justice which is noticeable in all the rabbinical decisions. The sages base their ruling upon the principle previously discussed, זכין לאדם שלא בפניו that we benefit a person also in his absence. Once the master delivered the deed, granting liberty to his bondman, the latter is entitled to the benefit he had intended to confer upon him.

There is a further exception to the general rule, based upon the principle above quoted, that we benefit a person in his absence. If Reuben owed Simeon money, or held in his possession a treasure belonging to Simeon, and, delivering this money or article to Levi, his representative,

[205] Ṭur, Ḥosh. Mish., 333, 1. 2. Cf. B. Mesi'a 31b, for explanation of term פועל בטל: the pay which a laborer would ask for stopping work for which he was engaged (which would be less than he would earn by working). Another opinion explains it: as much as a laborer out of work would take rather than be idle.

[206] So, too, in modern law. "While the principal has the power, he has not always the right to revoke, and agent has action against the principal for any damages caused thereby." Brush-Swan Electric Light Co. v. Brush Electric Co., 41 Fed., 163. While he can sue for damages, the courts will not specifically enforce the contract against the principal. Elwell v. Coon, 46 Atl., 580.

[207] Giṭṭin I, 5.

said: "Take this to Simeon to whom it belongs", he can no longer revoke Levi's authority nor recall the delivered article. Once it came to Levi's hands, it was accepted in behalf of Simeon.[208] The peculiarity of this decision is further complicated by the ruling that despite the fact that the principal can no longer recall his agent's power, he nevertheless, remains responsible for its safe delivery into the hands of Simeon.[209] This ruling, presented by Rab, was accepted as law, but Samuel disputes it and holds that the principal remains responsible and may also recall the power of the agent until the article is actually delivered to the third party. Samuel's view certainly is more logical and it is evident that the later authorities, while accepting Rab's decision, did not favor it, and limited its application only to the case כשהוחזק הנפקד כפרן when the principal was not an honorable person,[210] the suspicion being entertained that his attempt to recall the agent was prompted by his desire to defraud the rightful owner of the article.

Renunciation by Agent

Just like the principal, the agent, too, has the power to renounce his agency at any time, and the principal can have no legal claim against him.[211]

By Change in Condition of Parties

Agency is likewise terminated if there is a change in the condition of the parties. Death of either party puts an end immediately to the relation.[212] No act of the agent, after the principal dies, can bind the heirs of the principal, nor can the heirs benefit by his acts, unless they adopt him as their agent.[213] Although, as we have seen before,[214]

[208] Giṭṭin 14a; Ḥosh. Mish., 125, 1. This applies only to cases of debt or bailment, not in the case of gifts. Hosh. Mish., 125, 5.

[209] Ḥosh. Mish., 125, 1.

[210] Giṭṭin 14a; Ḥosh. Mish., 125, 2.

[211] Ṭur, Ḥosh. Mish., 183, 1. Cf. Barrow v. Cushway, 37 Mich., 481, for a similar ruling, where the agency is for an indefinite period or is an agency at will.

[212] Eben ha-'Ezer, 141, 41.

[213] Giṭ. I, 6; *ibid.*, 13a, f.

[214] Above, p. 60 and p. 30.

notice of the revocation of an agency is generally necessary, yet when it is revoked by death, the revocation takes effect at once, even as to persons ignorant of the principal's death.[215] It is for that reason that the codifiers advise a third party, in dealing with an agent, not to give up an article belonging to the principal unless the agent bears a *harsah'ah*. Without this power of attorney, if, when he gave up the article to the agent, the principal was dead, and the agent lost it or met an accident on the way that prevented his returning it, the third party would be liable to the principal's heirs, for the reason that the moment the principal died, the agency terminated, and the third party gave up the article at his own risk.[216] Where the agent, on the other hand, bears an *harsha'ah*, his power does not lapse by the death of the principal, as he is, in legal effect at least, an assignee of the claim and acts in his own right. It is for that reason, too, that the third party must always recognize the *Mursheh*, and cannot say to him: I fear to recognize you lest your authority has been revoked.[217] Once he displays the *harsha'ah*, he has a legal claim, and unless the third party has absolute knowledge of his revocation, he must deal with him.[218]

The subsequent occurrence of imbecility or deafness and dumbness of the agent or principal will also terminate

[215] For a similar ruling in English Common Law cf. Farmers' L. & T. Co. v. Wilson 139 N. Y., 284. In the Roman law, if the mandatory while ignorant of the death of the principal does act bona fide within his authority, the heirs of the principal are to be bound by what is so done. Inst. III, 26, 9, 11; Dig. XVII. So also, while death of either party ordinarily revokes, where it appears that the transaction at the time of the death was in such a state that there could not be a revocation, the liabilities will devolve upon the heirs. D XVII, 1, 2, 6; idem XXVII, 3.

[216] Ḥosh. Mish., 122, 1.

[217] While death does not automatically revoke in the case where one has a *harsha'ah*, it is nevertheless possible for the heirs of the dead principal to revoke the agency. Hence, where the third party is apprised of the death of the principal, he is advised not to recognize the *Mursheh*, for he can fear that the heirs have revoked the agency cf. באר היטב, *ibid.*, quoting the ש"ך and the מהרש"ל.

[218] Maim. III, 10; Ḥosh. Mish., 122, 3.

the relation.[219] The same reason that operates to suspend an agency during ineligibility affects its revival upon the restoration to eligibility.[220]

Where the Parties are Joint

We have already seen that where the principals are joint, the agent, while he can renounce his agency with respect to all, cannot renounce with respect to part of his principals.[221] So, too, where the agents are joint, it is to be presumed that the principal desires their joint action and judgment. And indeed, there is a view expressed to the effect that the revocation or the renunciation of part of their number or the death of one of their number, would terminate the agency of all.[222] The law, however, is not so, and decides that even where part of the number renounce or have their agency revoked, the status of the remainder is unaffected.[223]

Where there are Sub-Agents

Where authority is given to the agent to appoint a sub-agent, it is presumed that the power of the latter proceeds from the principal,[224] and is therefore not affected by the death of the agent who appointed him.[225] If the principal, on the other hand, dies, the authority of the sub-agent as well as of the first agent is revoked.[226] The death of the

[219] This may be inferred from Eben ha-'Ezer, 141, 32. This would be a case of תחלתו בכשרות אבל אין סופו בכשרות. So, too, in modern law after occurring insanity terminates agency. Story's "Agency," § 487.

[220] Eben ha-'Ezer, *ibid.*, see above, p. 44. Cf. also for a similar modern decision, Harris v. Lane, 10 N. H., 156.

[221] Cf. above, p. 45.

[222] Cf. Eben ha-'Ezer, 141, 61, יש אומרים. For similar modern views cf. Hartford Fire Ins. Co. v. Wilcox 57 Ill, 55.

[223] *ibid.*: Maim. Hilkot Gerushin 6, 18. Cf. Giṭṭin 33a, 33b, where, however, the Talmud decides on another issue, on the question of the validity of the testimony of a part, where the testimony of a number is concerned.

[224] Eben ha-'Ezer, 141, 39; cf. above, p. 47.

[225] Eben ha-'Ezer, 141, 41.

[226] *ibid.* Cf. also Lehigh Etc. Co. v. Mohr 83 Pa. St. 228, 24 Amer. Rep. 161.

sub-agent, unlike the death of the first agent, does not terminate the relation, and the first agent can either proceed with the work himself or appoint another sub-agent to continue the transaction.[227]

LEGAL EFFECT OF THE RELATION

Obligations of Principal to Agent

If an agent is appointed to perform a certain act for his principal, he is entitled to be reimbursed for all sums which he has paid out in the course of his agency for his principal's benefit. The outlays, however, must be only for the ordinary, regular or customary expenses that were reasonably necessary. The principal is not responsible for expenses unreasonable in amount or unnecessary for the performance of the agency.[228]

Where the agent, in the pursuit of his mission, suffered a personal loss, either monetary or physical, he cannot claim indemnity therefor from the principal.[229] Even where, because of his undertaking the act of agency, he would become a captive or a prisoner, he cannot demand that his principal shall redeem him.[230]

The Anglo-American law discusses at length the question whether or not an agent may claim indemnity for the consequence of his act, if the act was illegal, but the agent was ignorant of its illegality, and comes to the conclusion that the agent has this right. Thus, an auctioneer who innocently sells for his principal goods belonging to a third person is entitled to indemnity in case he is obliged to

[227] Eben ha-'Ezer, 141, 42.

[228] Isserles, Ḥosh. Mish., 182, 3. Cf. for a similar ruling Maitland v. Martin 86 Pa. St., 120; Goodman v. Meisel 65 Ind., 32. Roman law also held that mandator was bound to recoup the mandatory for expenses incurred.

[229] Ḥosh. Mish., 188, 6.

[230] Isserles to Hosh. Mish., 176, 48. Where, however, he is a gratuitous agent. the prevailing opinion is that he can demand of his principal to liberate him (*ibid.*) In modern law the agent is entitled to indemnity against the consequences of all acts performed in the due execution of his authority, which are not illegal or due to his own default. Cf. D'Arcy v. Lyle 5 Binney (Pa.). 441; Saveland v. Green 36 Wis. 612.

respond to the true owner for conversion.[231] In Jewish law this problem could not arise, because the agent cannot be sued, once he acted on good faith, not knowing that the act was illegal.[232] The principal alone, in a such a case, would be responsible, and he alone could be sued by the injured party.[233]

OBLIGATIONS OF AGENT TO PRINCIPAL

Must Obey Principal's Instructions

If the principal in appointing the agent specified certain conditions which he desires the agent to perform in connection with the act of agency, these conditions must be fulfilled by the agent. If he goes beyond his power he "does not effect anything", that is, his acts are void. Thus if A authorizes B to sell his house to one man and B sells it to two, the sale is invalid.[234] Or,[235] if A sends B to pay a debt which he owes to C with the instruction to take back from C the note which he holds as proof of the debt, and if B returns the money without asking for the note, B, the agent, will be responsible for any loss that A may suffer thereby.[236] The principle underlying these and similar rules of the law is expressed in the words that the principal may always say to his agent: לתקוני שדרתיך ולא לעוותי "You are to benefit me by your service and not to injure me".[237]

[231] Adamson v. Jarvis, 4 Bing 66; Castle v. Anoyes 14 N. Y., 329; cf. Bibb v. Allen 149 U. S., 481.

[232] See above, p. 56.

[233] Cf. also פתחי תשובה to Ḥosh. Mish., 182, 3, beginning שהשליח בר חיובא where a somewhat similar case of indemnity is discussed.

[234] Maim. I, 4.

[235] *ibid.*, I, 6. Cf. Ketub. 85a.

[236] If, however, the principal, when authorizing the agent, did not mention the note, the principal cannot hold the agent, if the latter returned the money without asking for the note, *ibid.*

[237] Ketub. 99b; B. Bat. 169b; Ḳidd. 42b.

Good Faith

Thus anything done by the agent that tends to work harm to the principal, invalidates the act and cannot affect the principal. Thus, if the *Mursheh* violates his trust by selling his power of attorney to the debtor or by cancelling the debt, the act, as affecting the principal, will be of no value, unless, of course, the authority was granted with the accompanying condition that whatever the agent will do shall bind his principal.[238]

Negligence of Agent

The agent, whether paid or gratuitous, is obligated to use reasonable care in whatever he undertakes to do, else the principal may hold him liable for any loss sustained.[239] Thus, if A gave money to B wherewith to purchase wheat, and B did so, but placed the wheat in a house where the rain was likely to injure it, the agent will be held responsible for the damage occasioned thereby.[240]

As to Honesty of Agent

If the agent pleads that he met an accident and thereby sustained a loss in the article belonging to the principal, then, if the agent can bring witnesses to prove his claim, he is relieved from all liability for his loss. If he cannot bring any witnesses, then, if the accident occurred at a time and place, at which it was not likely that others should witness it, the agent must take the oath that is usually administered in such cases to bailees, and he will not be held further responsible. But where the accident happened in a public place, where witnesses were undoubtedly present,

[238] Maim. III, 9: כל תנאי שבממון קיים.

[239] So, too, in Charlesworth v. Whitlaw, 74 Ark., 277, 85 S. W. 423; Preston v. Prather, 137 U. S. 604. In Roman law, however, an agent, though gratuitous, must show omnis diligentia, failing which he must pay damages.

[240] Ḥosh. Mish., 187, 4.

or where it is claimed that the accident was seen by other people, the agent, in order to be relieved from liability must produce witnesses to prove his claim, else the principal may hold him liable for his loss.[241]

In fact, if the principal has a suspicion as to the honesty of the agent who represented him in a transaction, if he has reason to believe that he did not turn over to him all the money that he made or all the goods that he purchased, he has a right to demand that the agent take an oath that he did not act dishonestly. This he may do even though the agent was a gratuitous one and derived absolutely no benefit from his agency.[242]

Agent's Liability for Loss

We noted above that in their legal effect there is no difference between the *Sarsor* and the gratuitous *Shaliaḥ*.[243] There is, however, a difference in the cases where the agent bears a liability to his principal for money or articles belonging to the latter. The *Sarsor*, receiving pay for his services, is regarded like a שומר שכר "paid bailee" and is therefore held responsible also in the case where the article is lost or stolen.[244] The *Shaliaḥ*, who serves gratuitously, is regarded as the שומר חנם "gratuitous bailee", and is held liable only in the case of gross negligence,[245] and is free from liability in all other cases.

Agent Who Fails to Perform

An agent, whether paid or gratuitous, cannot be held liable for a mere non-feasance, where he has never entered upon the undertaking. Thus if A says to B: Here is money, purchase therewith some fruit for me, and B fails to pur-

[241] Maim. II, 9; Ḥosh. Mish., 187, 1, 2.

[242] Maim. IX, 5.

[243] See above, p. 22.

[244] Ḥosh. Mish., 185, 7. He is held liable even if he lost it while on the way to return it; *ibid.*

[245] Cf. for a similar ruling in case of gross negligence in gratuitous agency, Whitehead v. Greitham, 2 Bing. 464.

chase, A has no legal redress.[246] While the rabbis do not allow him any legal claim, they imply that the agent, in not fulfilling this agency, did not act in a fitting manner, and the principal has cause for תרעומות moral grievance and complaint.

Where Agent Buys for Himself Instead of for the Principal

We have just seen that an agent is not held legally liable when he fails to perform an act of agency which he has undertaken to perform. We have also learned that an agent may renounce his agency at all times.[247] An interesting question now arises: Suppose A appointed B to purchase for him certain goods. B does not purchase it for A, but does purchase it for himself. Has A any claim against B? Logically, following out the above rules, it would seem that he has not. He can claim that he renounced his agency in behalf of A. So, too, he can say to A: If I had not purchased it at all, you would have had no legal redress. Why should you be able to hold me liable if I bought it for myself? This argument is a logical and a valid one, on one condition however, and that is if the agent made no use of the principal's money in conducting the transaction for himself. This is, evidently, the view of the Talmud. While it does not countenance his act, though he used his own money in the transaction, and even terms him a רמאי "cheat" for acting in such fashion, it nevertheless rules that the principal has no legal claim against him. The Talmud derives its ruling from the following interesting case: If A commissions B to marry for him C, and B marries her himself, she remains the wife of

[246] Maim. I, 5, VII, 6; Ḥosh. Mish., 183, 1. Cf. T. J. B. M. 10b. So also in modern law in case of gratuitous agency; cf. Thorne v. Dios, 4 Johns (N. Y.) 84.

[247] Above, p. 62.

B, though B's action is not to be regarded as honorable.[248] But it is to be remembered that the case applies only where the agent used his own money in marrying C; where, however, he used the money of his principal, it is held that the marriage to B is not valid.[249]

And so, too, Maimonides states the law that where the agent put aside the purchase money that he took from the principal in order to return it to him, and used his own money in purchasing the articles for himself, the principal has no legal redress, though it is the action of a רמאי cheat.[250] But, on the other hand, where the agent used the money of the principal, the latter may compel him to turn the goods thus purchased over to him, and if the agent, instead of keeping the goods for himself, resold it to another and made profit out of the transaction, he may be compelled to give up to the principal all that he thus earned.[251] Even if the agent, in using that money declared himself a borrower of his principal, he cannot keep the article for himself, as long as the money used was that entrusted to him by the principal.[252]

A compromise view is suggested by the Maggid Mishneh that if the agent, before purchasing the goods for himself, renounces his agency before witnesses, in such a case he may declare himself a borrower of his former principal

[248] Ḳidd. 58b, 59a. Cf. Eben ha-'Ezer, 35, 9. Where, however, the woman expressly stated that she does not want to marry his principal but is willing to marry him (the agent), he may do so, and his action will not be regarded as the act of a רמאי; Cf. Tosefta, Yebamot, ch. 4, האומר לחברו צא וקדש לי אשה פלונית · · · · צא וקח לי מקח פלוני וכו' and the Gaon R. Elijah Wilna's emendation מקח מפלוני (הגהות הגר"א) *ibid.*). According to the Gaon, the agent is a רמאי cheat only in the case where the principal designated the third party from whom he was to purchase the article; otherwise, principal would have cause for תרעומות grievance only. Where, however, the article purchased was something of unusual value—as an antique באין מינו מצוי—there, even according to the Gaon, the agent would be a cheat if he purchased it for himself, even though the principal did not specify the party from whom the purchase was to be made (מצפה שמואל, *ibid.*).

[249] Cf. בית יוסף and דרישה to Ṭur, Eben ha-'Ezer, 35, 9, both quoting the Mordecai, who states that the Talmud must be understood in this fashion.

[250] Maim. Mekirah VII, 10.

[251] Maim. Mekirah VII, 12. Cf. Ḥosh. Mish., 183, 1. 2.

[252] Ḥosh. Mish., 183, 3; cf. Maim., *ibid.*

and purchase for himself.[253] There is, however, very little warrant for this view in the Talmud, and Maimonides and Al-Fasi expressly state that even where he can prove that he renounced his agency before witnesses, he cannot purchase for himself, but must deliver the goods to his principal.[254]

Where the agent can prove that the third party did not care to deal with the principal but was willing to deal with him, in that case the agent is permitted to purchase the goods for himself, but he must, of course, use his own purchase money. Even here, however, he is in duty bound to first make the fact known to his principal. Where there is a possibility that while he will take the time to notify his principal, the goods will be sold to another, he may purchase it immediately and inform his principal of the fact, after the transaction.[255]

Can an Agent Sell to Himself?

In the case where an agent, authorized to sell something for his principal, purchases the article for himself, we see a striking similarity in the decisions of the Jewish law and the modern cases. The general rule is that an agent cannot purchase such goods for himself, even at the stipulated price that the agent was authorized to sell, unless he has the express consent of his principal.[256] Where the agent paid him the money he asked as its purchase price, and the principal accepted it, agreeing to the sale, the sale is, of course, valid and the principal cannot afterwards cancel it.[257] Where the price was not specified by the principal,

[253] Maggid Mishneh. to Maim. Mekirah VII, 12.

[254] Cf. Isserles, Ḥosh. Mish., 183, 3.

[255] Maim. Mekirah VII, 11; Ḥosh. Mish., p. 183, 2. This was the case of Rab who was given money by Rabba bar Bar Ḥana, Ḳidd. 59a. Cf. also Storey v. Eaton 50 Me. 219.

[256] Ḥosh. Mish., 185, 2. Cf. Anderson v. Grand Forks 1st Nat. Bank 5 N. D. 451, 67 N. W. 821.

[257] Ḥosh. Mish., 185, 3.

there is no doubt that, under no circumstances, can the agent sell to himself. If the agent did sell to himself, and afterward resold it to another at a profit, the principal can demand the sum thus realized plus the profit.[258] This rule, prohibiting the agent to sell to himself, was so strictly followed, that even in the case where a principal appointed an agent to sell his field, the latter could not purchase it for himself, even though he was a מצרן, i. e. had the prerogative of a neighbor—the right of preemption.[259] Not only that, but by acting as agent the law assumes that he has given up the rights that he had before; and thus, if he sold the field to a third party, and he is himself a מצרן, he is afterwards denied the right to pay off the purchaser and to take the land for himself.[260]

The Roman and the English law base their decisions on the ground that the relationship is founded on the confidence that the principal reposes in the agent, and therefore that the agent dare not do anything that may tend to violate this faith of the principal. Jewish law bases its decisions, in these cases, also upon the element of confidence, and says that by selling to himeself the agent is tempted to show lack of that good faith that he must always display.[261] The rabbis, however, have another reason to justify their strictness. Carrying the principle שלוחו של אדם כמותו "A man's agent is like himself" to a logical conclusion, they say that even where there is no doubt as to the good faith of the agent, as where he was told to sell at a specified price, he is not permitted because the principal can say to his agent: "Who sold it to you? I appointed you to sell, and selling comprises the transfer

[258] Responsa of מהרש"ך quoted by באר היטב, *ibid.*, 185, 2. Cf. Motley v. Motley 42 N. C. 211 for a similar ruling.

[259] Cf. B. M. 108b; Ḥosh. Mish., 175, 16.

[260] *ibid.*

[261] Cf. באר היטב to 175, 16.

of a thing from the ownership of one person to that of another. You are my alter ego. The article, therefore, did not leave my ownership. It is as if I sold to myself, which is, of course, impossible."[262]

Can an Agent Represent Both Parties?

Whether an agent may represent the third party as well as his own principal in the same transaction is not definitely decided. In the matter of divorce, the law remains undecided whether the wife can appoint as her agent to receive the get the party who is also serving as her husband's agent to deliver it to her.[263] An agent who is appointed to collect a debt or to pay a debt can act in behalf of the third party. But this is an exceptional case as we can see from the rulings above mentioned, because of the principle זכין לאדם שלא בפניו of benefiting a person in his absence. In fact, the moment the money is placed in his hands to deliver to the third party, he automatically becomes, in legal effect, the representative of the third party, though his principal remains responsible for its safe delivery.[264]

In the ordinary cases of selling or other business transactions, the matter remains undecided,[265] though it seems to me that he should not be able to represent both. All such cases require transfer of property from one possession to another. By his acting for both such a transfer would be impossible.[266]

As to Extra Profits

When the agent, engaged in a certain transaction in

[262] Cf. Ṭur, 185, 3, in the name of Rashba. But compare ב"ח to Ṭur, 185, 2, bot. ספיקא דרינא; cf. Gitṭin 63b; פרקי הרא"ש, *ibid.*; Eben ha-'Ezer, 141, 1.

[264] Cf. above, p. 62.

[265] באר היטב, Ḥosh. Mish., 185, 1, in name of ש"ך.

[266] Cf. above, note 262. Modern law does not permit it, when the two parties have opposing interests, and each requires discretion and judgment. McDonald v. Maltz 94 Mich. 172. When, however, he merely serves as middleman, not in a capacity which implies trust or confidence, he may. Montross v. Eddy 94 Mich. 100.

behalf of his principal, succeeds in getting a bargain, i. e. he secures the article at a lower price than that specified by his principal, or sells it at a higher price than that mentioned by him, the extra profit belongs to the principal.[267] Thus if A commissioned B to purchase for him wheat at a certain price, and B succeeded in getting it at a lower price, the amount thus saved is for the benefit of the principal.[268] So, too, if the agent is given an extra measure or larger weight by the third party, the extras also belong to the principal. We noted previously the case where a principal tells his agent to sell the article for four dollars and the agent is successful in getting six. Here, too, the decision is that the surplus profit belongs to the principal.[269] The rabbis, however, limit the application of this general rule only to those cases where the article sold or bought has no market value. The agent is in duty bound to do his best to serve his principal. Where there is no market value, we assume that the agent did thus serve faithfully and tried to get as much as possible for him in whose behalf he served. When, however, the article had a definite market value, the rabbis decree that the surplus gain is to be divided equally between the agent and the principal.[270] For both have equally just claims; the agent can claim: The gain is mine, as it was meant for me, inasmuch as the price paid was more than its market value. The principal, again, can say: You made the gain in my transaction and through the use of my money or goods. The profit is therefore divided between them, giving satisfaction to both.[271]

[267] Maim. I, 5; Ṭur, 185, 1. 3. Cf. Ketub. 98b.

[268] Maim. *ibid.*

[269] Above, p. 27; Ṭur, *ibid.*

[270] Maim., *ibid.*; Ḥosh. Mish., 183, 6. When the third party states expressly that he gave the extra measure to the agent himself, the principal cannot claim it. Cf. Isserles, *ibid.*, quoting RaN and a response of RaMBaN.

[271] Both the Roman and the English law sternly prohibit the agent from keeping unto himself profit or gain accrued, but must in all cases turn it over to principal

Where the Agent Went Beyond the Powers Conferred upon Him

We have already mentioned the principle underlying the whole relationship between the agent and his principal, namely, that the principal can always say to him לתקוני שדרתיך ולא לעוותי "you have been appointed to benefit me and not to cause me loss." This principle is scrupulously followed by the rabbis. There is only one exception to it, viz. where the principal, in appointing him, conferred upon him unlimited authority in that he expressly agreed to whatever his agent will do, whether it will be to his benefit or hurt,[272] otherwise the rule holds that the principal is not to suffer because of an act done for him by his representative. Thus, a transaction negotiated by an agent may be set aside if the other party to it was guilty of "overreaching", or if it was a mistaken transaction, even though the amount concerned was less than one sixth of the value, though, if the transaction was negotiated by the principal himself, it would not be set aside, because one-sixth is the limit allowed between parties dealing with each other in person. It would be set aside, too, though the purchase or sale was of land or of a bond, to which the law of overreaching does not apply.[273]

Where the agent deviates from his principal's instructions, the transaction may be set aside.[274] But where, because of the transaction, the principal is made to suffer loss, the agent will be held liable to him for the full amount of his loss. If, in the same transaction, there was a profit or gain, the gain, on the other hand, will belong to the principal. This applies with equal force to the gratuitous

[272] Maim. I, 3; Ḥosh. Mish., 182, 3.

[273] Maim. I, 2; Ḥosh. Mish., 182, 3; cf. Ketubot 100a.

[274] Ḥosh. Mish., 188, 5. So, too, in Roman law if the mandatory exceeds the powers conferred on him by the mandator, the latter was not bound by his acts, D. XVII, 1, 5.

as well as to the paid agent.[275] Thus if A commissioned B to purchase wheat, and B purchased barley instead, the agent will be held responsible for any loss suffered by the principal in the transaction, while if there is a profit, the profit will belong to the principal.[276] We must not confuse the various rulings in these cases when the agent deviates or transgresses from his principal's orders. The principal may refuse to accept the results of the transaction. In that case, the transaction is of no value, and the principal cannot be held liable either by the agent or by the third party. If he wants to avoid the transaction, he has a right to do so even if the agent offers to make good any loss sustained.[277] What we mean when we say that if there is loss in the transaction it must be borne by the agent, or if there is a gain it goes to the principal, refers to those cases where the principal desires to ratify the transaction in question. Here we say that he may do so, and, in addition, he may hold the agent for any loss suffered or for any extra profit made in the transaction. In other words, a transaction in which the agent did contrary to his principal's instructions, is not void but voidable only at the discretion of the principal. We shall now be able to better understand a decision as given by Maimonides, and stated by the later codes, which, upon its face, seems to be unreasonable, but as interpreted by the commentators, follows the rule I have just formulated: A authorizes B to purchase for him a plot of land from C. B buys the land but without taking

[275] Maim. II, 6, I. 5; Ḥosh. Mish., 183. 5, 185. 1. In Roman law if agent deviates from instructions, principal also had right to all advantages, but was not responsible for disadvantage; Gaius Bk. III, 161, Inst. III, 26, 8.

[276] *ibid.*, 183, 6. The Talmud presents the divergent views of R. Meir and R. Judah as to this ruling: the former regards the very deviation as termination of agency and therefore the agent takes possession for himself. According to him, the profits as well as the losses will be his. R. Judah holds that the deviation does not terminate the relation. Therefore the profits belong to the principal. Where there is a loss the principal may say to him: You were to benefit me and not to injure me, you must, therefore, stand the loss. Cf. B. Ḳ. 102b.

[277] Ṭur, 188, 5; cf. ש"ך comment to the words מכל וכל, *ibid.*

a guarantee of title. B must take the land for himself, without the guarantee as purchased, and A can force B to give him his own personal guarantee.[278] This decision, as it stands, seems to be opposed to the general rule that when, by the agent's carelessness or deviation, the principal would suffer, the principal could not be held liable in the transaction. And so RABeD rightly asks: Why should it be so? If there was a mistake in the purchase, the principal should have the right to annul the entire transaction. And he gives us as answer the statement that this is a case where the principal wanted the land and was willing to ratify the sale, even without the third party's guarantee. The act was therefore voidable and he had the legal right either to refuse or to accept the land. The agent, however, was careless and did not serve his principal with that spirit of faithfulness and devotion that is required of him. He must therefore give to his principal his personal guarantee, if the latter desires to ratify his act.[279] This interpretation could also be inferred from the wording of the law as stated by Maimonides: "The agent takes the land unto himself without the guarantee and reconveys it to his principal with his own guarantee הואיל וקנה אותה במעותיו since he purchased it with his principal's money". The latter phrase has no meaning, unless we take it to mean that the principal cannot be forced to purchase the land, but if he desires the land, he may have it and force his agent to give his own guarantee, *since he purchased it with his principal's money.*

The Talmud, in discussing the legal consequences of an agent's act, if he went beyond that which he was authorized to do, makes a fine distinction between the agent who

[278] Maim. I, 3; Ḥosh. Mish., 182, 6. In this case it is presumed that the third party expressly told the agent that he will not give a guarantee, otherwise the omission of guarantee would be regarded as a scribe's error and the guarantee would be inferred Maim. Mekirah, XIX, 3; B. B. 169b. Cf. Kesef Mishneh, *ibid.*

[279] Cf. also Kesef Mishneh, *ibid.*, quoting RaN to the same effect.

totally disregards and violates his principal's commission מעביר על דבריו, and the one who does perform but who, of his own accord, adds to the errand of agency something that he was not authorized to do,[280] מוסיף על דבריו. The former is a case of עיוות injury, and the principal has a right to regard the act as invalid; in the latter instance, the act authorized is valid and binds the principal, but the additional act done unauthorized is invalid and is voidable at the will of the principal. An example of the latter case follows: If A engages B to sell one acre of his land, and B sold two acres, the sale of the one acre authorized is regarded as valid, while the sale of the additional acre is cancelled.[281] Where A engages B to sell two acres and B sells only one, there doubt was expressed as to whether this was a case of violation or of simple overstepping his order. The law decides that this is a case of violation and the sale of the one acre is therefore held invalid. The reason for this ruling seems to be the aversion to troubling the principal to write out several deeds of sale or to making him deal with more than one party.[282]

Obligations between Principal and Agent and the Third Party

Among the later authorities the opinion gained ground that in a case where the principal desires to have the transaction regarded as invalid because his agent went beyond the powers conferred upon him, the third party may, in such a dispute with the principal, claim that the

[280] Ketubot 98b; Maim. I, 4; Ḥosh. Mish., 182, 8.

[281] *ibid.*

[282] The same ruling applies where the principal ordered him to sell to one party and he sold to two; cf. *ibid.* Naḥmanides, quoted in Kesef Mishneh, even goes so far in his decision, that where the agent sold to two parties on one bill of sale, even then it is a case of מעביר and the principal can cancel it. He can claim that he does not want to bother with several parties. It is this reason, too, that is given for the rule that where an agent says: I am purchasing this land for my principal, and the deed is written in his principal's name, he cannot afterwards say: I purchased it for myself, write me another deed in my name. Maim. II, 5.

principal has given to the agent this wider authority, and the principal will have to bring witnesses to the contrary, if he wishes to be relieved of the agent's bad bargain.[283]

In all the cases where the principal is given a right to avoid the transaction because of the agent's acting beyond his authority, it must be noted that this right is conferred upon the principal alone. Where the principal is willing to stand by his agent's act, the third party cannot avoid it, on the ground that the agent went beyond his powers.[284]

The rules of law stated in the above chapters with reference to the principal's right to disregard all unauthorized acts of his agent, applies only in the case when the third party knew that he was dealing with an agent.[285] If the third party, however, did not know that he was dealing with an agent but thought that the agent was dealing for himself, the transaction will be regarded as valid between him and the agent, and the principal has no legal redress against the third party, but must sue the agent for any loss sustained.[286] Thus, the case noted above,[287] where an agent purchased land without a guarantee, and was compelled to take for himself and to re-convey it with his own guarantee to the principal, was explained by Rabbenu Nissim to refer to a transaction in which the principal was not disclosed. The agent, dealing in his own name, therefore had to stand by the purchase, while the principal, if he desired the land, could compel the agent to re-convey it to him with his personal guarantee.[288]

We note from this that Jewish law did not adopt the

[283] Ṭur, 182, 8, quoting RaMA.

[284] Cf. באר הגולה to Ḥosh. Mish., 185, 6.

[285] Jewish law does not hold that it is the duty of the agent to disclose his agency, cf. Rosh to B. Ḳ. 102b. Unless the seller, at time of sale, expressly states that he would sell only to him and not to anyone else; in that case he must specify the third party of his appointment, or acquire it for himself, and the principal will have to acquire it from agent. Cf. also above, note 61.

[286] Maim. II, 4; Ḥosh. Mish., 182, 2.

[287] Above, p. 77.

[288] Cf. Kesef Mishneh to Maim. I, 3.

ruling of the modern law with reference to the undisclosed principal.[289] Where the agent deals in his own name, and does not disclose the fact that he is dealing in behalf of a principal, the latter will have no claim upon the third party, and the third party will be able to say to him לאו בעל דברים דידי את "you are not my adversary", I have no dealings with you. The third party, upon discovering that the transaction was not in the agent's own behalf, will also not be able to sue the principal for the same reason. Whether the principal could be sued by the third party if he makes use of the article purchased by his agent, and the agent refuses to pay, is a different question, and the decision will rest not upon the rules of agency, but upon the ordinary rules of quasi-contract.

Even when there is a dispute between the principal and his agent as to whether the agent fulfilled his commission or not, e. g., if the principal claims: I told you to sell the article for $100, and the agent says: You told me to sell it for $50, and I sold it for that sum, if the third party knew that he was dealing with an agent, he will have to return the article or money secured to the principal. This decision suffices to prove to what extent the rabbis went to protect the principal, and also to show how careful a third party had to be when he knew that he dealt with an agent.[290]

Where an agent disposes of his principal's property beyond the scope of his authority, as, for instance, where an agent sold an article which he held in his possession that belonged to his principal, without being author-

[289] The Common Law as well as the Roman clung to the doctrine of Privity of Contract. Contrary to this doctrine, modern law established the sweeping rule that an undiscovered principal may both sue and be sued upon a contract made in his behalf or to his secret use by his agent, to the same extent as a disclosed principal, although the third party gave exclusive credit to the agent supposing him to be the principal. Cothay v. Fennel 10B&C 671; Kayton v. Barnett 116 N. Y. 625.

[290] Maim. II, 6. RABeD (*ibid.*) disagrees with the decision of Maimonides and rightly says that it opens the way for the principal and the agent to conspire in order to get the article back, if they regret the transaction.

ized to sell it at any specified price, the third party will be in duty bound to return it to the principal.[291]

Where the agent has been appointed to deliver a debt due a third party and the third party happens to be indebted to the agent himself for a previous debt, the agent can set off or deduct from the money that he collected the amount due him, and the third party will have no further claim against the principal. This, however, applies only in the case where this party admits the debt, admits that it is now due, and also makes claim that he has no other possessions from which the debt can be paid. But if he denies the debt, or if he has other possessions, the agent cannot keep for himself any of the moneys he collected. Furthermore, if the agent refuses to give up the money, the principal can be sued by the third party for the amount.[292]

We have learned above[293] that when the agent was deceived in the transaction by the third party, even when the amount was a mere trifle (less than $1/6$ its value), the transaction would be set aside. When, however, the third party had been deceived by the agent, the same rule does not apply and he is governed by the one-sixth limit allowed between parties dealing with each other in person.[294] While this view, given in the name of R. Jonah, is the accepted one, there is also a strong opposing view. Hai Gaon held that just as the agent so also the third party could set aside the transaction if the amount concerned by the agent's overreaching was even less than one-sixth. He compares this case to the one where the Bet Din, the Court, sells goods in behalf of orphans. There, the rule of overreaching is used for the benefit of the purchaser as well as for

[291] Maim. II, 7; Ḥosh. Mish., 185, 6; but see Isserles, *ibid.* So also in modern law; cf. Thompson v. Barnum 49 Iowa 392.

[292] Ḥosh. Mish., 125, 3. The modern law does not permit the agent to deduct or to set off a debt due to himself in a matter not arising out of the agency. Melvin v. Aldridge 81 Md. 650.

[293] Above, p. 75.

[294] Ṭur, 182, 9.

the orphans. R. Jonah, however, points out a distinct difference between the two cases, when the Bet Din sells for the orphan, it is at the same time the agent of both the orphan and the third party, hence the law of overreaching applies to both. Here, however, the agent does not represent the third party, and hence, the latter cannot invoke the benefit of this rule.[295]

PRESUMPTIONS OF LAW

Until there is definite notice of the principal's revocation of his agent's power, there is a presumption that the agent is authorized to carry out his commission, and the third party has the right to rely upon this presumption.[296]

There is also a presumption of law to the effect that חזקה ששליח עשה שליחותו an agent has done his duty and has fulfilled his commission, until the contrary appears.[297] This presumption has led the rabbis into a discussion of a very complicated nature. What would happen if A sent B to marry for him a woman whom he considered suitable, and B dies without A knowing with whom he entered into the marriage contract in his behalf? The presumption of law being that B fulfilled his commission, A would be prohibited thereafter from marrying any woman who had relatives living, lest his marriage would be one in violation of the laws of consanguinity.[298] His only remedy would be to marry a woman whose immediate prohibited family relations were all dead or one who never had any.

CONCLUSION

The subject of agency is closely allied with other subjects where certain topics play a most important rôle.

[295] The Rosh agrees with the latter view, which is accepted as the rule of law cf. פסקי הרא"ש Ketubot XI, 17; Bet Yosef to Ṭur, *ibid.*

[296] באר הגולה, Ḥosh. Mish., 122, 2; cf. above, p. 30.

[297] Cf. Giṭṭin 64a; Eben ha-'Ezer, 35, 11 The same presumption is met in modern law; cf. Breed v. Breed 55 N. Y. App. Div. 121, 67 N. Y. Suppl. 162.

[298] Giṭṭin and Eben ha-'Ezer, *ibid.*

The writer has, therefore, limited himself to a discussion of those rules of law that belong to Agency in particular, and has omitted all discussions of those rules which, while applicable to Agency, form subjects in themselves. Thus he did not discuss the law pertaining to Oaths, though Oaths play a prominent part in the relationship of Agency, where there is a dispute between the parties with reference to the acts of the agent.[299] He has omitted also the law dealing with the eligibility of an agent to give evidence in a dispute in which he is an interested party, a subject well treated by all writers on Evidence in Jewish Law.[300] The writer has also deliberately omitted discussions of those laws that deal with agency in religious matters, e. g. the question of the priest, whether, when he performed the rites of sacrifice, he was to be regarded as the representative of the Almighty or the agent of the Israelite who brought the sacrifice; or the laws relating to the שליח צבור representative of the Jewish community in their religious service.

The writer believes, however, that a sufficient presentation has been made to prove how far advanced, nay, how almost modern, the Jewish rabbis were in their treatment of this complex relationship between a principal and his representative.

[299] For a discussion of this subject cf. Z. Frankel, *Die Eidesleistung der Juden*; J. E. Tyler, *Oaths*.

[300] Cf. Z. Frankel, *Der Gerichtliche Beweis nach Mosaisch-Talmudischen Rechte*; I. Blumenstein, *Die verschiedenen Eidesarten nach mosaisch-talmudischen Rechte*.

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56. TaZ (ט"ז) Ṭure Zahab.—A commentary on all parts of Shulḥan ʿAruk, by R. David b. Samuel ha-Levi, Polish Rabbi (1586–1667). The TaZ and his oppponent the SHaK are the greatest authorities among the latter-day rabbinic lights, and their decisions are of greater importance than those of Caro or of Isserles. In 1683 the Council of Four Lands declared that the authority of the TaZ should be considered greater than that of the SHaK, but later, the latter gained more and more authority.

57. Tosefta (תוספתא).—A collection of early rabbinic passages, belonging in character to the Mishnah, but not included in that Code. "Tosefta" literally means "Addition." In its present form it belongs to the 5th or 6th century.

58. Ṭur, or Ṭurim (טור, טורים).—Code of rabbinic law and ritual, compiled by R. Asher son of R. Jacob (b. Germany, 1280; d. Toledo, Spain, 1340). Entitled by him the Four Rows (Ṭur signifies a row), and divided into four parts, called Ṭur Oraḥ Ḥayyim, treating of liturgical laws; Ṭur Yoreh Deʿah, treating of ritual laws; Ṭur Eben ha-ʿEzer, treating of matrimonial laws, and Ṭur Ḥoshen Mishpaṭ, treating of civil laws.